Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–47–03 OF 2014(W) AND 05–48–03 OF 2014(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ABDULL HAMID EMBONG, SURIYADI AND RAMLY ALI FCJJ
10 FEBRUARY 2015

Criminal Law — Offences — Unnatural offences — Sodomy — Penal Code s 377A — Whether DNA evidence established penile penetration of complainant's anus by appellant — Appellant's semen/sperm found in complainant's anus — Whether government chemists' DNA evidence reliable — Whether foreign experts called by defence to give DNA evidence cast reasonable doubt on prosecution's case — Whether chain of custody of exhibits broken and integrity of samples compromised — Whether evidence of DNA profiling on items used by appellant while in custody illegally obtained and inadmissible — Whether complainant credible and testimony sufficiently corroborated — Whether appellant's political conspiracy defence mere allegation without proof — Whether appellant's unsworn statement from dock not credible defence but bare denial of charge

The appellant, a prominent senior politician, was charged in the High Court under s 377A of the Penal Code with committing carnal intercourse against the order of nature against his then personal assistant, Mohd Saiful Bukhari bin Azlan ('PW1'). After the close of the defence's case, the High Court acquitted and discharged the appellant of the offence on the ground the DNA analysis done by one of the government chemists, 'PW5', could not be reconciled with the evidence of two experts called by the defence, 'DW2' and 'DW4', thus casting a reasonable doubt on the prosecution's case. In addition, the trial court also held that since all the body swabs taken from PW1 at the Kuala Lumpur Hospital were individually put into plastic receptacles, labelled and sealed and all the receptacles were then sealed in a common plastic bag (P27) before being handed to the investigating officer, 'PW25', the latter's action in later cutting open P27 to relabel the receptacles before sending them to the chemist had compromised the integrity of the samples. The trial judge held that since the court could not be absolutely certain the integrity of the samples had not been compromised before they reached the chemist, it was unsafe to rely on the DNA result obtained from the chemist's tests on the samples; hence there was no evidence to corroborate PW1's evidence on the factum of penetration, an ingredient of the offence. On the prosecution's appeal, the Court of Appeal ('the COA') reversed the High Court's findings, convicted the appellant and sentenced him to five years' jail. The instant appeal was against that decision.

The prosecution's cross-appeal was for enhancement of the sentence. The host of issues raised by the appellant in the instant appeal revisited matters that were raised before the courts below and included contentions that PW1 was not a credible witness; that his evidence was not corroborated; that there was a break in the chain of custody of the exhibits; that DNA evidence that the appellant's semen/sperm were found on rectal swabs taken from PW1 was unreliable in view of the delay before the samples were tested; and that the courts below had failed to consider or evaluate the appellant's defence of political conspiracy. This last ground was based on the contention that PW1 had, two days before the offence, met with the then Deputy Prime Minister of Malaysia and on the same evening met with a high-ranking police officer at a hotel; that he then contacted the then Inspector General of Police the following day; that the day following the sodomy, and before lodging a police report, PW1 had met with four other persons which included a senator and a former national sprinter.

Held, dismissing the appeal and the cross-appeal and affirming the decision of the Court of Appeal on conviction and sentence:

(1) The chemist, 'PW6', compared the DNA profile obtained from the swabs of items the appellant had used in the lock up (P58A, P59A and P61A) with the report of the other chemist, PW5, who had found DNA belonging to a 'Male Y' on the swabs taken from the perianal and high rectal regions of PW1. PW6 concluded that the DNA profile she had obtained matched the DNA profile of Male Y. It was thus indisputable that the profile of Male Y developed and analysed by both the chemists belonged to none other than the appellant. The DNA evidence of Male Y was the key corroborative evidence to the element of penile penetration by the appellant, an ingredient of the offence with which the appellant was charged (paras 107, 129, 160, 166 & 168).

(2) The court agreed with the Court of Appeal's conclusion that the trial judge erred in accepting the evidence of DW2 and DW4 that the samples taken from PW1 had been compromised and were unsafe to be relied upon resulting in an absence of corroborative evidence on the factum of penetration. On the facts of the case, the possibility of the samples having been compromised before it reached the chemist was remote. The evidence of DW2 and DW4 failed to raise any reasonable doubt on the prosecution's case. They did not themselves do any tests on the samples but merely interpreted and made observations on the findings of PW5 and 'PW6' who had personally carried out the DNA analysis on the samples. DW4 had his last proficiency test seven years prior to the trial while PW5 and PW6 had undergone proficiency tests once every six months. There was nothing inherently incredible about PW5's and PW6's evidence and the appellant had failed to discredit them (see paras 173, 209, 211 & 213–214).

(3) The crucial point to note from the evidence of PW5 and PW6 was that although there was some degradation to the samples, the damage was not substantial enough to destroy the DNA entirely and the DNA profiles were readable. It was therefore incorrect and misleading to conclude that because of the degradation, the DNA profiling was rendered unreliable. The court found the degradation had no effect whatsoever on the DNA profiling in this case (see paras 113–114, 118 & 122).

(4) PW5 in her testimony confirmed that she did not detect any tampering of the seals of the exhibits marked B to B10. The court therefore found there was no break in the chain of custody of those exhibits and that the integrity of the samples had not been compromised (see para 125).

(5) There was no dispute that the samples PW6 examined came from the items that were used solely by the appellant when he was detained at the lock up. The recovery of those exhibits used by the appellant was not a transgression of any rule, nor was it an infringement of the appellant's constitutional right to a fair trial. He was lawfully detained at the lock up and the gathering of evidence there by the forensic team was a legal and fair method of police investigation. Even if those exhibits recovered from the lock up were illegally obtained — which were not so — in law, they remained admissible if found to be relevant to the case per s 5 of the Evidence Act (see paras 98, 103 & 165).

(6) The court agreed with the findings of the courts below that there was ample corroborative evidence to support PW1's testimony that he had been sodomised by the appellant. PW1 was not an accomplice whose evidence required corroboration; he was not a willing participant in the offence but a victim (see paras 84–86).

(7) The court found PW1 to be a credible witness. There was nothing inherently improbable about his story. It took a lot of courage for PW1 to make such a disparaging complaint against a well-known politician like the appellant knowing that such an allegation might taint him (PW1) and his family. The minute details testified by PW1 gave his testimony a ring of truth and unless he had personally experienced the incident he would not have been able to relate the antecedent facts and the sexual act in such minute detail (see paras 50–51 & 61).

(8) Although the courts below did not explicitly consider the defence of political conspiracy raised by the appellant in his unsworn statement from the dock, in law, a trial judge would not give much weight to what an accused said in his unsworn statement as he was not subject to cross-examination nor could he be questioned by the trial judge. The Court of Appeal agreed with the trial judge that the appellant's statement from the dock was a mere denial. Although it was the appellant's right to give a statement from the dock, that statement must amount to a credible

defence. A mere denial did not amount to a credible defence. The defence of political conspiracy therefore remained a mere allegation unsubstantiated by any credible evidence (see paras 202 & 204–205).

(9) There was overwhelming evidence to support PW1's allegation that he had been sodomised by the appellant. The appellant's unsworn statement, which evidentially carried little weight, and the evidence adduced through his witnesses, failed to cast any reasonable doubt on the prosecution's case. The prosecution had established its case beyond reasonable doubt (see paras 224–225).

(10) Taking into consideration the seriousness of the offence and the fact the appellant took advantage of his position as the employer of a young victim, the sentence of five years was not grossly excessive; neither was it manifestly inadequate to warrant the court's intervention (see paras 237–238).

[Bahasa Malaysia summary

Perayu, seorang ahli politik terkenal, telah dituduh di Mahkamah Tinggi di bawah s 377A Kanun Keseksaan kerana melakukan hubungan di luar tabii terhadap mantan pembantu peribadinya, Mohd Saiful Bukhari bin Azlan ('PW1'). Selepas penutup kes pendakwaan, Mahkamah Tinggi telah membebas dan melepaskan perayu daripada kesalahan atas alasan analisis DNA yang dilakukan oleh salah seorang daripada ahli kimia kerajaan, 'PW5', tidak dapat diselaraskan dengan dua pakar yang dipanggil oleh pembelaan, 'DW2' dan 'DW4', oleh itu menimbulkan keraguan munasabah ke atas kes pendakwaan. Tambahan pula, mahkamah perbicaraan juga memutuskan bahawa oleh kerana semua swab badan yang diambil daripada PW1 di Hospital Kuala Lumpur telah diletakkan dalam bekas plastik yang berasingan, dilabel dan ditutup dan kesemua bekas itu kemudian disimpan dalam beg plastik biasa (P27) sebelum diserahkan kepada pegawai penyiasat, 'PW25', tindakan PW25 berikutan itu yang memotong untuk membuka P27 bagi melabel semula bekas-bekas tersebut sebelum menghantarnya kepada ahli kimia telah menjejaskan integriti sampel-sampel itu. Hakim perbicaraan telah memutuskan bahawa oleh kerana mahkamah tidak benar-benar pasti yang integriti sampel itu tidak terjejas sebelum ianya sampai kepada ahli kimia, ia adalah tidak selamat untuk bergantung kepada keputusan DNA yang diperoleh daripada ujian-ujian ahli kimia itu ke atas sampel-sampel tersebut; justeru itu tiada keterangan untuk menyokong keterangan PW1 tentang fakta penetrasi, satu elemen dalam kesalahan itu. Atas rayuan pendakwaan, Mahkamah Rayuan ('MR') telah mengakas penemuan Mahkamah Tinggi, mensabitkan perayu dan menghukumnya penjara selama lima tahun. Rayuan ini adalah terhadap keputusan tersebut. Rayuan balas pendakwaan adalah untuk penambahan hukuman. Pelbagai isu yang ditimbulkan oleh perayu dalam rayuan ini mengkaji semula perkara-perkara yang telah ditimbulkan di hadapan mahkamah bawahan dan termasuklah hujah-hujah bahawa PW1

bukan saksi yang boleh dipercayai; bahawa keterangannya tidak boleh disokong; bahawa terdapat rantaian jagaan ekshibit yang terputus; bahawa ketarangan DNA yang air mani/sperma perayu dijumpai pada swab rektum yang diambil daripada PW1 tidak boleh dipercayai berdasarkan kelewatan sebelum sampel-sampel itu diuji; dan bahawa mahkamah bawahan telah gagal mengambil kira atau mengkaji pembelaan konspirasi politik perayu. Alasan terakhir ini adalah berdasarkan hujah bahawa PW1 telah, dua hari sebelum kesalahan itu, berjumpa dengan mantan Timbalan Perdana Menteri Malaysia dan pada petang yang sama telah berjumpa dengan pegawai polis berpangkat tinggi di sebuah hotel; bahawa dia kemudian telah menghubungi mantan Ketua Inspektor Polis pada hari berikutnya; bahawa pada hari selepas kejadian liwat itu, dan sebelum membuat laporan polis, PW1 telah berjumpa dengan empat orang lain termasuklah seorang senator dan seorang bekas pelari pecut negara.

Diputuskan, menolak rayuan dan rayuan balas dan mengesahkan keputusan Mahkamah Rayuan atas sabitan dan hukuman:

(1) Ahli kimia, 'PW6', telah membandingkan profil DNA yang diperoleh daripada swab item-item yang telah digunakan oleh perayu dalam lokap (P58A, P59A dan P61A) dengan laporan ahli kimia lain, PW5, yang mendapati DNA milik 'Male Y' pada swab yang diambil dari bahagian kelangkang dan bahagian atas rektum PW1. PW6 memutuskan bahawa profil DNA yang diperolehinya sepadan dengan profil DNA Male Y. Oleh itu tidak dapat dinafikan bahawa profil Male Y yang dikembangkan dan dianalisis oleh kedua-dua ahli kimia adalah milik tidak lain daripada perayu sahaja. Keterangan DNA tentang Male Y adalah keterangan utama yang nyata kepada elemen penetrasi zakar oleh perayu, unsur kesalahan itu yang mana perayu telah dipertuduh (lihat perenggan 107, 129, 160, 166 & 168).

(2) Mahkamah bersetuju dengan kesimpulan Mahkamah Rayuan bahawa hakim perbicaraan terkhilaf kerana menerima keterangan DW2 dan DW4 yang mana sampel-sampel yang diambil daripada PW1 telah terjejas dan tidak selamat untuk digunakan yang mengakibatkan ketiadaan keterangan yang nyata tentang fakta penembusan itu. Berdasarkan fakta kes, kemungkinan sampel-sampel itu terjejas sebelum sampai kepada ahli kimia adalah terpencil. Keterangan DW2 dan DW4 gagal untuk menimbulkan apa-apa keraguan munasabah atas kes pendakwaan. Mereka sendiri tidak melakukan apa-apa ujian ke atas sampel-sampel itu tetapi hanya mentafsirkan dan membuat pemerhatian tentang penemuan PW5 dan PW6 yang telah menjalankan analisis DNA secara peribadi ke atas sampel-sampel itu. DW4 telah melakukan ujian kecekapan terakhirnya tujuh tahun lalu sebelum perbicaraan itu manakala PW5 dan PW6 telah melakukan ujian kecekapan tersebut sekali setiap enam bulan. Tiada apa-apa yang pada asasnya luar biasa

tentang keterangan PW5 dan PW6 dan perayu telah gagal untuk memburukkan mereka (lihat perenggan 173, 209, 211 & 213–214). A

(3) Perkara penting untuk diberi perhatian daripada keterangan PW5 dan PW6 adalah meskipun terdapat beberapa degradasi kepada sampel-sampel itu, kerosakan itu tidak begitu besar untuk memusnahkan keseluruhan DNA dan profil-profil DNA boleh dibaca. Oleh itu adalah tidak betul dan mengelirukan untuk membuat kesimpulan bahawa disebabkan oleh degradasi, pemprofilan DNA dianggap sebagai tidak boleh dipercayai. Mahkamah mendapati degradasi tersebut tidak mempunyai kesan apa pun terhadap pemprofilan DNA di dalam kes ini (lihat perenggan 113–114, 118 & 122). B C

(4) PW5 dalam keterangannya mengesahkan bahawa dia tidak mengesan apa-apa pengubahan kedapan pada ekshibit-ekshibit bertanda B hingga B10. Mahkamah oleh itu mendapati rantaian jagaan ekshibit-ekshibit tersebut terputus dan bahawa integriti sampel-sampel itu tidak terjejas (lihat perenggan 125). D

(5) Tiada pertikaian yang sampel-sampel diperiksa oleh PW6 datang daripada item-item yang digunakan semata-mata oleh perayu apabila dia ditahan di lokap. Pengambilan semula ekshibit-ekshibit tersebut yang digunakan oleh perayu bukan pelanggaran apa-apa peraturan, juga bukan suatu pelaggaran hak perlembagaan perayu mendapat perbiacaraan adil. Dia telah ditahan dengan sah di lokap itu dan pengumpulan keterangan oleh pasukan forensik adalah cara penyiasatan polis yang sah dan adil. Walaupun ekshibit-ekshibit tersebut yang dijumpai dari lokap itu diperoleh secara tidak sah — yang tidak begitu — dari segi undang-undang, ia masih boleh diterima jika didapati relevan kepada kes itu seperti dinyatakan dalam s 5 Akta Keterangan 1950 (lihat perenggan 98, 103 & 165). E F G

(6) Mahkamah bersetuju dengan penemuan mahkamah bawahan bahawa terdapat keterangan yang nyata mencukupi untuk menyokong keterangan PW1 bahawa dia telah diliwat oleh perayu. PW1 bukan rakan sejenayah yang mana keterangan memerlukan sokongan; dia bukan peserta yang sanggup dalam kesalahan itu tetapi merupakan mangsa (lihat perenggan 84–86). H

(7) Mahkamah mendapati PW1 saksi yang boleh dipercayai. Tiada apa-apa yang pada asasnya mustahil tentang ceritanya. Ia memerlukan keberanian untuk PW1 membuat aduan yang mencaci ahli politik yang terkenal seperti perayu dengan mengetahui bahawa pengataan sebegitu mungkin menjejaskannya (PW1) dan keluarganya. Butiran terperinci yang diberi keterangan oleh PW1 menyerlahkan kebenaran dalam keterangannya dan kecuali jika dia sendiri mengalami kejadian itu dia I

tidak mungkin dapat mengaitkan fakta sebelumnya dan perbuatan seksual itu secara terperinci (lihat perenggan 50–51 & 61).

(8) Walaupun mahkamah bawahan tidak secara jelas mempertimbangkan pembelaan tentang konspirasi politik yang ditimbulkan oleh perayu dalam kenyataannya yang tidak bersumpah dari kandang tertuduh, dari segi undang-undang, hakim perbicaraan tidak akan memberikan penekanan tentang apa yang dikatakan oleh tertuduh dalam kenyataan tidak bersumpahnya kerana dia tidak tertakluk kepada pemeriksaan balas juga tidak disoal oleh hakim perbicaraan. Mahkamah Rayuan bersetuju dengan hakim perbicaraan bahawa kenyataan perayu dari kandang tertuduh hanya satu penafian. Walaupun adalah hak perayu untuk memberi kenyataan dari kandang tertuduh, kenyataan tersebut hendaklah menjadi pembelaan yang boleh dipercayai. Penafian semata-mata tidak membentuk pembelaan yang boleh dipercayai. Pembelaan untuk konspirasi politik dengan itu masih suatu pengataan semata-mata yang tidak disokong dengan apa-apa keterangan yang boleh dipercayai (lihat perenggan 202 & 204–205).

(9) Terdapat banyak keterangan untuk menyokong pengataan PW1 bahawa dia telah diliwat oleh perayu. Kenyataan tidak bersumpah perayu, yang ternyata tidak penting, dan keterangan yang dikemukakan melalui saksi-saksinya, gagal untuk menimbulkan apa-apa keraguan munasabah ke atas kes pendakwaan. Pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 224–225).

(10) Dengan mempertimbangkan keseriusan kesalahan dan fakta bahawa perayu mengambil kesempatan ke atas kedudukannya sebagai majikan kepada mangsa yang muda, hukuman lima tahun tidak begitu melampau; dan ia juga jelas tidak mencukupi untuk mewajarkan campur tangan mahkamah (lihat perenggan 237–238).]

Notes

For cases on unnatural offences, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1727–1729.

Cases referred to

Adel Muhammed El Dabbah v A-G for Palestine [1944] AC 156, PC (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Bharwada Bhoginbhai Hirjibhai v State of Gujarat AIR 1983 SC 753, SC (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40, PC (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423; [1991] 3 CLJ 2387, SC (folld)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; [2002] 3 CLJ 457, FC (refd)
Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240, FC (refd)
Din v PP [1964] 1 MLJ 300, FC (refd)
Goh Ah Yew v PP [1949] 1 MLJ 150 (refd)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134, CA (folld)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Juraimi bin Husin v PP Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537; [1998] 2 CLJ 383, CA (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
Kuruma Son of Kaniu v Reginam [1955] 1 All ER 236, PC (refd)
Lee Boon Gan (f) v Regina [1954] 1 MLJ 103 (refd)
Liew Kaling & Ors v PP [1960] 1 MLJ 306b (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
Muharam bin Anson v PP [1981] 1 MLJ 222, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Muthusamy v PP [1948] 1 MLJ 57 (refd)
Public Prosecution Service v Elliott and another [2012] NI 154, CA (folld)
PP v Datuk Haji Harun bin Haji Idirs & Ors [1977] 1 MLJ 180 (refd)
PP v Emran bin Nasir [1987] 1 MLJ 166 (refd)
PP v Lam San [1991] 3 MLJ 426; [1991] 1 CLJ (rep) 391, SC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mardai [1950] 1 MLJ 33 (refd)
PP v Mohammed Liton Mohammed Syeed Mallik [2008] 5 SLR 601, CA (refd)
R v Baskerville [1916] 2 KB 658 (refd)
R v Doheny and Adams [1997] 1 Cr App Rep 369, CA (folld)
R v Watson [1980] 2 All ER 293, CA (folld)
R v Wayner Butler [2001] QCA 385, CA (refd)
Ramakrishnan s/o Ramayan v PP [1998] 3 SLR 645, HC (folld)
Rudy bin Jupri v PP [2013] 3 MLJ 362, CA (refd)
Rusman Sulaiman v PP [2013] 4 CLJ 305, FC (refd)
Saminathan & Ors v PP [1955] 1 MLJ 121 (refd)
Satyavir Singh v State of Uttar Pradesh AIR 1958 Cri LJ 1266, HC (refd)
State v Jyotish Prasad & Anor LIND 2009 DEL 799, HC (refd)
State of Kerala v Kurissum Moottil Antony AIR 2007 SCW 1507, SC (refd)
State of Maharashtra v Chandraprakash Kewal Chand Jain AIR 1990 SCC (1) 550, SC (refd)
State of Punjab v Gurmit Singh AIR 1996 SCC (2) 384, SC (refd)
Syed Abu Tahir a/l Mohamed Esmail v PP [1988] 3 MLJ 485, HC (refd)
Thenegaran a/l Murugan & Anor v PP [2013] 2 MLJ 855, CA (folld)

A *Udayar Alagan & Ors v PP* [1962] 1 MLJ 39, CA (refd)

Legislation referred to

Criminal Procedure Code ss 112, 294, 402A
Emergency (Essential Powers) Ordinance No 22/1970 s 2(1)
B Evidence Act ss 5, 114(g), 145(1), 155, 155(c)
Indian Penal Code [IND] s 377
Penal Code ss 377A, 377B, 377C

C *Gopal Sri Ram (Sivarasa Rasiah, N Surendran, Ramkarpal Singh, Sangeet Kaur Deo, Leela Jesuthasan, Latheefa Koya, Gobind Singh Deo, Lim Choon Kim, Michelle Yesudas, Shahid Adli bin Kamarudin, Zaleha Al Hayat, Jeremy Vinesh Anthony, Mohammad Adliff Bolkin, G Sivamalar, Muhammad Afiq bin Mohd Noor, Mohd Haijan Omar and Joanne Chua Tsu Fae with him) (Karpal Singh & Co) for the appellant.*

D *Muhammad Shafee Abdullah (Mohamad Hanafiah bin Zakaria and Suhaidariah bt Ahmad with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

E **Arifin Zakaria Chief Justice (delivering judgment of the court):**

INTRODUCTION

F **[1]** This is an appeal by the appellant against the decision of the Court of Appeal dated 7 March 2014 which allowed the prosecution's appeal against the decision of the High Court. The appellant was convicted of the offence as charged and sentenced to a term of five years imprisonment. The prosecution cross-appealed on sentence.

G **[2]** The charge preferred against the appellant reads:

> Bahawa kamu, pada 26 Jun 2008 antara jam 3.01 dan 4.30 petang di alamat Unit 11–5–1, Desa Damansara Condominium, No. 99 Jalan Setiakasih, Bukit Damansara, Kuala Lumpur di dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii
H dengan Mohd Saiful Bukhari bin Azlan dengan memasukkan zakar kamu ke dalam duburnya; dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan.

English translation:

I > (That you, on 26 June 2008 between 3.01 p.m. to 4.30 p.m. at Unit 11–5–1, Desa Damansara Condominium, No. 99, Jalan Setiakasih, Bukit Damansara, Kuala Lumpur in the Federal Territory of Kuala Lumpur, did intentionally commit carnal intercourse against the order of nature with Mohd Saiful Bukhari bin Azlan by inserting your penis into his anus; and thereby have committed an offence punishable under section 377B of the Penal Code).

[3] The offence of carnal intercourse against the order of nature is governed by s 377A and in this case punishable under s 377B of the Penal Code. For ease of reference, these two sections are reproduced below:

> Carnal intercourse against the order of nature
>
> 377A Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.
>
> Explanation — Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.
>
> Punishment for committing carnal intercourse against the order of nature.
>
> 377B Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

[4] Section 377A of the Penal Code deals with two specific deviant forms of sexual behaviour, namely sodomy and oral sex. In the explanation to the section, it is stated that penetration alone is sufficient to constitute the sexual connection necessary for the offence. No mention is made of consent. Thus consent is not an ingredient of the offence and is not accepted as a defence (*Mallal's Penal Law*, 2002, (2nd Ed)).

THE FACTS

[5] The facts relevant to this appeal as narrated by the trial judge are briefly as follows. Mohd Saiful Bukhari bin Azlan, the complainant ('PW1'), testified that he started working as a volunteer with the appellant in early March of 2008. From the end of April 2008 PW1 then worked as the personal assistant to the appellant. His duties, amongst others were to arrange for meetings, to communicate with agents and Members of Parliament from the appellant's party, to file confidential documents and to oversee the appellant's personal handphone. He also assisted the appellant's chief of staff, Ibrahim bin Yaacob ('PW24') to prepare work schedules as instructed by the appellant.

[6] On 26 June 2008, on the appellant's instruction PW1 went to Unit 11–5–1, Desa Damansara Condominium, No 99, Jalan Setiakasih, Bukit Damansara, Kuala Lumpur ('Unit 11–5–1'). PW1 took with him some documents given to him by PW24 to be delivered to the appellant.

[7] PW1 left the office at about 1.45pm, and drove to Desa Damansara Condominium in a Fiat van bearing registration No WPK 5925. He arrived at Unit 11–5–1 at approximately 2.45pm and upon arrival PW1 found the door

not locked. He then entered the unit. He saw the appellant seated at the dining table. PW1 then sat at the table facing the appellant and placed the documents on the table.

[8] They discussed work schedule and not long after that the appellant asked PW1, 'Can I fuck you today?'. PW1 said initially he refused and when the appellant asked him why, PW1 answered that he did not wish to do it that day. The appellant then instructed him in an angry tone to go into the master bedroom. PW1 followed the appellant's instruction. In the bedroom, the appellant closed the curtain and switched off the light. He then directed PW1 to clean himself in the bathroom. PW1 then went into the bathroom and came out covered only with a towel.

[9] The appellant was then standing at the lower right end corner of the bed, clad only in a white towel. PW1 went to the appellant when he was told to do so and the appellant hugged him.

[10] Further evidence was given in camera where PW1 described the carnal intercourse by describing how his anus was penetrated by the appellant's penis with the aid of a lubricant known as 'KY Jelly'. PW1 also testified that the appellant ejaculated in his anus. After the carnal intercourse PW1 went into the bathroom and wiped himself with water. The appellant then invited PW1 to have some refreshments with him. 20 minutes later, PW1 left the condominium.

[11] On 27 June 2008, PW1 sent an e-mail to the appellant conveying his wish to resign. The reasons he gave were that he was undisciplined, always late to the office and also felt the pressure as he was given a room in the new office over those who were more qualified. However, in his testimony PW1 said that the real reason for his resignation was that he did not wish to be sodomised by the appellant again.

[12] On 28 June 2008 at 1pm, PW1, accompanied by his uncle Tuah bin Mohd Ali, went to Tawakal Hospital at Jalan Pahang but failed to see any doctor as it was a half working day. PW1 then proceeded to 'PUSRAWI' (a private hospital) at Jalan Tun Razak where he met Dr Than Aung @ Muhamed Osman bin Abdul Hamid ('DW1'). PW1 informed DW1 that he had stomach ache and felt pain in his anus. DW1 examined PW1 and while DW1 was inserting something into PW1's anus, PW1 told him that he had been sodomised and needed an examination. Upon hearing this, DW1 immediately stopped the examination and told PW1 that PUSRAWI did not have the facility for forensic examination. PW1 was also informed by DW1 that any

medical report from a private hospital could not be used as evidence in court. PW1 was then directed by DW1 to go to a government hospital and suggested Hospital Kuala Lumpur.

[13] PW1 went to Hospital Kuala Lumpur and registered himself as an outpatient. That was around 3pm. He was then referred to one Dr Daniel. PW1 informed Dr Daniel that he wanted to be examined because he was sodomised by Dato' Seri Anwar lbrahim. Upon hearing this, Dr Daniel issued a referral letter and directed PW1 to go to the One Stop Crisis Centre ('OSCC') at the Emergency Department. He arrived at the OSCC at about 3.30pm.

[14] After about 30 minutes at the OSCC, a doctor came and took PW1's blood pressure. PW1 informed the doctor the reason for seeking examination was that he had been sodomised.

[15] At about 4.30pm, the doctor came again and advised PW1 to lodge a police report without which a forensic examination could not be performed on him. After waiting for about an hour, two policemen came with a form for PW1 to lodge his report. PW1 then made his report (P3).

[16] After lodging the police report, PW1 was examined by three doctors, namely, Dr Mohd Razali Ibrahim ('PW2'), Dr Siew Sheue Feng ('PW3') and Dr Khairul Nizam bin Hassan ('PW4'). Also present was Dr Razuin bt Rahimi ('PW23'), who filled up the proforma form.

[17] PW2 took swabs from the perianal region, low rectal and high rectal from PW1, while PW4 took swabs from the oral cavity at the left peritonsillar recess, below the tongue, the left nipple and areola, the right nipple and areola, body swab from the mid chest to epigestur and one penile swab from the hiatus and coronal area.

[18] While PW1 was being examined, the investigating officer Supt Judy Balcious Pereira ('PW25') was present to observe the whole examination on PW1. PW1 further testified that since the date he was sodomised until he was examined by PW2, PW3 and PW4, he had not passed motion.

[19] The samples collected from PW1 at the hospital were then placed into individual containers, labelled and sealed by PW3. The samples were then placed inside a sample bag (P27) which was then sealed and handed over to PW25 at 12.35am on 29 June 2008. PW25 then placed P27 in a steel cabinet in his air conditioned office.

[20] On the same day, PW1 handed over to PW25 the KY Jelly (P4), a long sleeve Ralph Lauren brand shirt (P11), a pair of black trousers (P12), a green shirt (P13), a grey underwear (P14) and a dark blue underwear (P15).

[21] On 30 June 2008, at about 9am, PW25 cut the bottom of P27 and put each container containing the swabs into individual envelopes which he marked as B to B10. On the same day at about 7.55pm, PW25 handed over the envelopes together with a handing over form, 'Pol.31' (P24), to the chemist, Dr Seah Lay Hong ('PW5') who acknowledged receipt (P30). In her testimony, PW5 confirmed that she found no evidence of any tampering to the seals on the various individual containers which contained the swabs. According to her, had she found any evidence of tampering she would have stated it in her report.

[22] In the chemist report (P25) prepared by PW5, she recorded the results of her analysis of the samples. From the examination, PW5 was able to detect semen on swabs B5, B7, B8 and B9. Using the sperm isolation test, she found sperm cells in those samples and from a microscopic examination, PW5 found sperm heads. The material parts of the chemist report prepared by PW5 show the following:

...

iv) The DNA profile derived from swab 'B5' (labeled 'Mohd Saiful Bukhari Bin Azlan') consisted of a mixture of male DNA types concordant with being contributed by the donor of bloodstained specimen 'B10' (labeled 'Mohd Saiful Bukhari Bin Azlan'), 'Male Y' and one other male contributor.

v) The DNA profiles derived from swab 'B7' (labeled 'Mohd Saiful Bukhari Bin Azlan') consisted of male DNA types from two individuals, one having a DNA profile matching that of bloodstained specimen 'B10' (labeled 'Mohd Saiful Bukhari Bin Azlan') and one matching the DNA profile of 'Male Y'.

vi) The DNA profiles derived from swab 'B8' (labeled 'Mohd Saiful Bukhari Bin Azlan') indicated one dominant male contributor concordant with the DNA profile of bloodstained specimen 'B10' (labeled 'Mohd Saiful Bukhari Bin Azlan') and 'Male Y' as a minor contributor.

vii) The DNA profiles derived from swab 'B9' (labeled 'Mohd Saiful Bukhari Bin Azlan') consisted of male DNA types from two individuals concordant with being contributed by the donor of bloodstained specimen 'B10' (labeled 'Mohd Saiful Bukhari Bin Azlan') and 'Male Y'.

[23] On 11 July 2008, the Clinical Forensic Department of Hospital Kuala Lumpur received the chemist report (P25) regarding the result of the analysis

conducted on the samples collected. PW2, PW3 and PW4 together prepared the Report of Clinical Forensic Case (P22) dated 13 July 2008, which they jointly signed. Their conclusions were as follows:

(i) No conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient.

(ii) The presence of male DNA types from swabs 'B5', 'B7', 'B8', and 'B9' are best interpreted with the identification of the sites of sampling.

[24] PW2, PW3 and PW4 were subjected to lengthy cross-examinations which centred over their findings that PW1's anus showed no scarring, fissure or any sign of recent injuries, in particular at the external area. When clarifying P22, which stated that 'No conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient', PW2, PW3 and PW4 explained that it did not mean that there was no penetration.

[25] Upon receiving the report from the chemist, PW5 confirming the presence of spermatozoa in the rectum of PW1, and also the exact sites from which the samples (B5, B7, B8 and B9) were taken, PW2, PW3 and PW4 explained that penetration could take place without any injury to the rectum. They gave three possible grounds to explain why there was no injury, namely the lapse of time prior to seeing the doctors, no undue force having been used and the use of lubricant during the sexual act.

[26] On 16 July 2008, DSP Yahya bin Abdul Rahman ('PW17'), L/Kpl Nik Rosmady bin Nik Ismail ('PW18') and L/Kpl Mohd Azry bin Mohd Toyeb ('PW19') confirmed that the appellant was brought to and detained in the lock up at the Kuala Lumpur Police Contingent Headquarters ('IPK Kuala Lumpur'). According to PW17, the appellant brought with him a bottle of mineral water and two towels. At the lock up, PW18 gave the appellant a plastic package containing a 'Good Morning' towel, a toothbrush, a tube of toothpaste and a bar of soap.

[27] On 17 July 2008 after the appellant was taken out of the lock up, PW17 saw a 'Good Morning' towel and a toothbrush on the lock up floor and a mineral water bottle on the toilet half wall. PW17 was instructed to keep the lock up under lock. On the same day, Supt Amidon bin Anan ('PW15') head of the crime scene investigation, went to the lock up which had been occupied solely by the appellant. He was assisted by Insp Nur Ayuni Dayana bt Mohd Fuad ('PW16'). On the floor of the lock up, PW15 found the following items:

(a) a strand of hair (P57A);

(b) a toothbrush (P58A);

(c) a 'Good Morning' towel (P59A); and

(d) a mineral water bottle (P61A).

[28] PW15 instructed L/Kpl Mohd Hazri bin Hassan ('PW14') to take photographs of those items. He also instructed PW16 to prepare four envelopes (P57, P58, P59 and P61). Each of the above items was placed inside individual envelopes. The envelopes were marked with Nos 4, 5, 6 and 7. PW15 signed on the back of each envelope and sealed them. On the same day, PW15 handed over the envelopes to PW25 at the IPK Kuala Lumpur. Both PW15 and PW25 signed a handing over form (P80).

[29] PW25 took the envelopes back to his office at about 3.35pm and kept them in a steel cabinet in his office. PW25 marked each envelope as 'D', 'D1', 'D2' and 'D3' (P57, P58, P59 and P61) respectively and sealed the envelopes with a 'PDRM' seal. At about 6.50pm, PW25 took the items and handed them over to Nor Aidora bt Saedon ('PW6'), a chemist at the Chemistry Department.

[30] PW6 successfully developed deoxyribonucleic acid ('DNA') profiles from the swabs of the toothbrush, the 'Good Morning' towel and the mineral water bottle, but not from the hair. These DNA profiles matched each other, indicating that the DNA identified originated from the same source. PW6 then compared the DNA profiles she obtained with that obtained by PW5. PW6 found the DNA profiles developed from the swabs from the toothbrush, the 'Good Morning' towel and the mineral water bottle matched the DNA profile of 'Male Y', thus indicating that the DNA identified originated from a common source. PW6 then prepared a report (P62).

PROCEEDINGS IN THE HIGH COURT

[31] At the end of the prosecution's case, upon a maximum evaluation of the prosecution's case, the trial judge held that the prosecution had established a prima facie case against the appellant. Accordingly, the appellant was called upon to enter his defence.

[32] The appellant in his unsworn statement from the dock advanced the theory of a political conspiracy by the Prime Minister, Dato' Sri Mohd Najib bin Tun Abdul Razak, with the purpose of ending his political career by putting him behind bars.

[33] The appellant's statement may be summarised as follows:

(a) PW1 had all the opportunity to flee;

(b) PW1 did not seek immediate medical attention;

(c) the medical evidence did not support PW1's complaint;

(d) PW1 did not lodge a police report immediately after the incident;

(e) PW1's conduct did not support his claim of being sodomised as he had a drink and a friendly conversation with the appellant immediately after the incident and attended PKR's function and a meeting of Anwar Ibrahim's Club the next day;

(f) PW1 has connection with the Prime Minister and the Inspector General of Police;

(g) PW1 could have resisted the appellant as he is younger and physically bigger than the appellant;

(h) the appellant is old and weak with a history of back injury and had undergone a major surgery; and

(i) the appellant does not hold any position of power.

[34] In respect of the scientific evidence, which we shall deal with in detail later in this judgment, the appellant called a number of expert witnesses.

[35] Professor David Lawrence Wells ('DW2') commented that there were serious shortcomings in the filing of D28 (proforma form) by PW23. PW1's history and essential information, as required in D28, was incomplete and tardy in its preparation. It was bad practice not to complete D28 in full and it was riddled with ambiguity.

[36] DW2 further testified that it was wrong for PW2, PW3 and PW4 to have come to the conclusion in court that there was 'anal penile penetration' based on another person's opinion ie, PW5, who testified that she found semen in the PW1's rectal swabs as there were many other ways by which semen could have found its way into PW1's anus.

[37] On the issue of semen found on PW1's rectal swabs as evidenced from PW5's findings, both DW2 and Dr Brian Leslie McDonald ('DW4') testified that there was no photographic evidence presented by PW5, to positively indicate that the sperms were actually seen in the swabs. According to DW2 and DW4, one could hardly succeed in collecting any sample of value from which DNA could be extracted beyond 36 hours after a sexual assault. This is based on the Australian experience or practice.

[38] When confronted with an article by JE Allard — reported in Forensic Science International, 19 (1982) pp 135–154, that sperms could be found even after 65 hours in the rectum, DW2 answered that the scientific community has some reservation about that single case in 30 years. 36–48 hours might be the limit in which good DNA profile could be obtained. In this case, it was already past the time span. Furthermore, the samples here were not only not dry or frozen but also kept at room temperature. According to DW2, from his experience it was unlikely that anything of value could be retrieved.

[39] Dr Thomas Hoogland ('DW7') testified that, due to the back injury suffered by the appellant, he was of the opinion that it would be very unlikely for the appellant to be able to commit the sodomy in the way described by PW1.

[40] Dr Osman bin Abdul Hamid (DW1) was offered to the defence by the prosecution and was the first witness called by the defence to support the appellant's case. According to DW1, on 28 June 2008, PW1 turned up at PUSRAWI for treatment complaining of pain in the anus when passing motion. DW1 examined PW1 using a proctoscope for suspected piles but found no injury. As PW1 was putting on his trousers and DW1 was washing his hands, PW1 told DW1 that he had been sodomised by a VIP and was scared to go to the police. According to DW1, had he been informed earlier, he would not have carried out the examination of PW1. DW1 alleged that PW1 also told him that he had been assaulted by the insertion of a plastic object into his anus.

[41] At the close of the defence case, the trial judge held that the appellant had succeeded in creating a reasonable doubt in the prosecution's case and acquitted and discharged the appellant of the charge. He came to his finding premised essentially on the evidence of DW2 and DW4 that it was unlikely any trace of semen could be retrieved 36 hours after the sexual assault. In this case, since PW1 was examined some 56 hours after the alleged incident, and relying on DW2's and DW4's evidence, it was very unlikely any sperm cell could have been retrieved from PW1's rectum. This he said was further compounded by the manner the samples were kept by PW25 which was contrary to the instruction of PW3. However, the 'EPG' (electropherogram) tendered by the prosecution according to DW2 and DW4 showed that the DNA was in pristine condition. Furthermore, PW25 had cut open the sample bag (P27).

[42] Having considered the defence evidence, the trial judge held that the possibility of the integrity of the samples taken from PW1 had been compromised before reaching PW5 for analysis could not be excluded. For that reason he held that it was not safe to rely on the DNA result obtained by PW5. In the result, he held that there was no evidence to corroborate PW1's evidence

on the factum of penile penetration, an ingredient of the offence, and on that premise the appellant was acquitted and discharged of the charge.

PROCEEDINGS IN THE COURT OF APPEAL

[43] The Court of Appeal disagreed with the finding of the trial judge that the defence had through their witnesses, in particular DW2 and DW4, succeeded in casting a reasonable doubt in the prosecution's case. The Court of Appeal held that DW2 and DW4 were mere armchair experts who had not done the analysis on the samples as opposed to PW5 and PW6 who had conducted the analysis on the samples. On this issue, the Court of Appeal preferred the evidence of PW5 and PW6 to that of DW2 and DW4. The Court of Appeal accordingly set aside the order of the High Court and the appellant was convicted and sentenced to a term of five years imprisonment.

PROCEEDINGS IN THIS COURT

[44] Several issues were raised by the appellant contending that the Court of Appeal had erred in their decision. We will now deal with these issues.

Credibility of PW1

[45] The appellant's appeal began by attacking the credibility of PW1. PW1's failure to run away from the place of incident, to ask for help from the occupier of Unit 11–5–2, to report to the security guard, and to make a police report immediately, ran counter to his testimony that he did not consent to being sodomised. The alleged vigorous act by the appellant on PW1 was not consistent with the medical report prepared by PW2, PW3 and PW4 which recorded no trace of violence or resistance. The medical report (P22) also stated that no tear was detected in his anus thus indicative of no penile penetration.

[46] PW1's conduct of bringing the KY Jelly, the inconsistency in the duration of the sexual act ie whether it was five minutes or thirty minutes, his delay in filing a police report, his attendance at a meeting with the appellant on 27 June 2008, DW1's annotation on the medical report of PW1 (IDD16) stating that PW1 had complained of a plastic object having been inserted into his anus, amongst others, were all brought to our attention.

[47] The appellant submitted that had IDD16 been introduced at the prosecution's stage, the court would have been confronted with two versions. First, of PW1 being sexually assaulted by the appellant and second of a plastic object having been inserted into his anus. The appellant suggested that, as it was incumbent upon the prosecution to call DW1 as a witness, its failure to do so had triggered s 114(g) of the Evidence Act 1950 ('the Evidence Act'). With

DW1's evidence left unimpeached, there were therefore doubts in the prosecution's case and the appellant was entitled to the benefit of the doubt.

[48] The prosecution on the other hand argued that PW1's evidence was credible. The comprehensive details narrated by PW1, especially of those before entering the condominium, and the graphic description of the sexual act, merely strengthened his credibility. He could not have described those material particulars unless he was there and had gone through the ordeal. The prosecution also argued that the previous encounters with the appellant were admissible in order to show PW1's state of mind and why he behaved the way he did. The word 'every time' in his testimony was indicative of the previous encounters. As he was reminded of the memory of the sensation of pain he came prepared with the KY Jelly. The prosecution suggested that the availability of the KY Jelly and the lapse of time explained why there was no injury on PW1's anus. The prosecution added that the previous sexual encounters would help the court appreciate the type of relationship PW1 had with the appellant, explain why PW1 did not resist or run away, why he remained in Unit 11–5–1 after the sexual encounter, and why he attended the meeting together with the appellant the next day.

[49] So, was PW1 credible? First the law. In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457, Haidar Mohd Noor FCJ (as he then was), quoted the decision of the trial judge in that case with approval and reiterated the test for either accepting or rejecting the evidence of a witness, as follows:

> The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v Sitaram* AIR 1936 PC 60). It must, however, be observed that being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability of a fact in issue must be the prime consideration (see *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b). It has also been held that discrepancies and contradictions there will always be in a case. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy (see *De Silva v Public Prosecutor* [1964] 1 MLJ 81). The Indian Supreme Court has pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v State of Bihar* AIR 1965 SC 277). It is useful to refer to *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at p 19:

> ... In my opinion, the discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. The question is whether existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.
>
> In the absence of any contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted (see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257) ...

[50] We must say, similarly in this case it takes a lot of courage for a young man, like PW1, to make such a disparaging complaint against a well-known politician like the appellant. Knowing that such an allegation might taint him (PW1), we cannot ignore the life-long negative effect such a serious allegation would have on PW1 and his family even if the allegation were proven to be true.

[51] The minute details testified by PW1 gave his testimony the ring of truth, as, unless he had personally experienced the incident, he would not be able to relate the antecedent facts and the sexual act in such minute details. It must be borne in mind too that despite the lengthy cross-examination, PW1 had withstood that gruelling session which the trial judge described as 'sometimes bordering on harassment'. PW1 spoke of the previous encounters he had with the appellant, the unpleasant sensation of pain and the reason for bringing the KY Jelly. He hid nothing. The trial judge found PW1 to be completely open and honest. The Court of Appeal agreed with this finding.

[52] Specifically on the issue of delay in lodging the police report by PW1 and his failure to complain to the occupier of Unit 11–5–2 and the security guard, the trial judge had also considered them and made the following findings:

> [111] I find it is not tenable to use PW1's failure to escape when he had the opportunity, failure to seek help or failure to complain to security guard as indicative that the offence did not take place. Under normal circumstances, such failures would be construed to mean that the incident indeed took place but it was consensual which is not relevant in our case.
>
> [112] And in any event, PW1 was never asked to explain why he did not run, did not seek help from the occupier of Unit 11–5–2, complain to the security guard or make a police report immediately. However from the established facts borne out by the evidence of PW1, it was not difficult to understand why PW1 had acted the way he did though he insisted he did not consent to being sodomised.

A [113] PW1 was a young man aged 22 years old under the employment of the accused. He was not just any employee but the accused's personal assistant who had to deal directly with the accused. PW1 idolised the accused since he was a child. He liked working with the accused and found him to be charismatic. The accused was generous with PW1 and PW1 was given special treatment by the accused like
B presented with a suit even though he had just worked less than two months. He was given preferential treatment when he was allocated a room in the new office over more senior colleagues. The interview with the doctors in particular Dr Razuin and from PW1 own evidence suggest the incident on 26 June 2008 was not something totally unexpected as it had happened before. PW1 had reported to various people before but no one advised him to lodge police report and some were even sceptical.
C In fact the people like Ezam, Mumtaz and PW1's uncle even discouraged PW1 from lodging police report because they were concerned of PW1's future. The people in Unit 11–5–2 were all accused's friend.

[114] Based on those facts and circumstances, PW1's failure to run away, to complain to people in Unit 11–5–2 or to lodge police report immediately is
D understandable. It could not be the basis to find PW1 to be an incredible witness.

[53] The Court of Appeal agreed with the findings of the trial judge. It is an accepted fact that in sexual offences, a complainant is generally reluctant to
E lodge a complaint or report regarding such incidents for a number of reasons. As observed by the Indian Supreme Court in *State of Punjab v Gurmit Singh* AIR 1996 SCC (2) 384:

> The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix
F or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

[54] As noted by the trial judge, the issue of delay was never put to PW1 in
G the cross-examination and he found that such failure should not be taken against PW1.

[55] In the present case, considering the age of PW1 and his connection with the appellant, it was therefore reasonable for PW1 to take some time before
H lodging a police report, what more to complain to the occupier of Unit 11–5–2 whom he knew to be a friend of the appellant or to the security guard, who is a complete stranger.

[56] It is a settled principle of law that credibility of a witness is the domain
I of the trial judge and an appellate court should be slow in interfering with the findings of the trial judge who has the audio visual advantage. Having heard and observed the demeanour of the witness, the trial judge found PW1 to be a credible witness. His finding was upheld by the Court of Appeal, where it stated:

[54] We further agree with the finding of the learned trial judge on the credibility of PW1 and there was nothing improbable about his evidence. His Lordship found that the evidence of PW1 was reliable.

[55] It is trite law that credibility of witnesses is the domain of the trial judge. We are satisfied that the learned trial judge had sufficiently considered and appreciated the evidence of PW1 and His Lordship is entitled to make a finding on his credibility.

[56] An appellate court should be slow in interfering with findings made by the trial judge on the issue of credibility of witnesses. In *Muniandy & Ors v Public Prosecutor* [1966] 1 LNS 110, the Federal Court had this to say:

We appreciate that this court should not lightly differ from the views of the trial judge since he had the advantage of seeing and hearing the witnesses whose demeanour he was able to study in order to form his opinion as to their credibility ...

[57] We find no ground to disturb the findings of the trial judge on the issue of credibility of PW1. Accordingly, the challenge by the respondent on the credibility of PW1 cannot prevail.

[57] Before us it was also submitted by appellant's counsel that PW1's credibility is questionable for a number of reasons. First, it was alleged by PW1 that he was given an expensive gift (a Brioni suit) by the appellant and the trousers (P12) which was tendered in evidence came from that suit. However, counsel contended that P12 carried no label at all. Thus it was submitted that PW1 could not be telling the truth because such an expensive suit must carry a label; even an ordinary brand would carry a label, what more such an expensive suit.

[58] However, there was no cross-examination of PW1 by the defence on the absence of the label on the P12. As such, PW1 was not given any opportunity to explain the absence of that label. In the circumstances, we hold that it is not proper for counsel to raise this issue at this stage.

[59] Secondly, it was the prosecution's case that the act of sodomy took place in Unit 11–5–1 on the carpet (P49A). P49A was however recovered from Unit 11–5–2. The prosecution had not explained how P49A came to be in Unit 11–5–2. There was therefore a gap in the prosecution's case which was not explained as the owner of Unit 11–5–2 was not called. Counsel for the appellant remarked, 'I don't believe in flying carpet'. It was then submitted that with this gap PW1 could not have been telling the truth in that the act took place in Unit 11–5–1 and on P49A.

[60] We agree with counsel for the appellant that there was no evidence led as to how P49A 'moved' from Unit 11–5–1 to Unit 11–5–2. From the evidence, it is not in dispute that Unit 11–5–1 and 11–5–2 are adjacent to each other, and belonged to the same owner, Hassanuddin Abdul Hamid. P49A was

sent to the chemist for analysis but no trace of KY Jelly was found on it. There was also no conclusive evidence that the KY Jelly had in fact spilled onto P49A. What PW1 said in his testimony was that the KY Jelly could have spilled on either P49A or the towel. In any event, we are of the view that P49A was not a critical piece of evidence to the prosecution's case in light of other compelling evidence.

[61] Having gone through PW1's evidence and how he stood the vigorous cross-examination, we agree with the trial judge that there is nothing inherently improbable about his story. We too find him to be a credible witness.

Impeachment of PW1

[62] The issue of impeachment of PW1's evidence was also raised by the appellant. The complaint was over the dismissal by the trial judge of his application to impeach the evidence of PW1.

[63] Impeachment generally means to call into question the veracity of a witness by means of evidence adduced for such purpose or the adducing of proof that a witness is unworthy of belief. The relevant provisions of law relating to an impeachment proceeding is contained in s 155 of the Evidence Act which provides:

> Impeaching credit of witness
>
> 155 The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:
>
> (a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;
>
> (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
>
> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

[64] Section 155(c) must however be read together with s 145(1) of the Evidence Act which reads as follows:

> Cross-examination as to previous statements in writing
>
> 145(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[65] Section 145(1) sets out the procedure for impeachment. Taylor J in *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57 laid down in great detail the procedure for impeachment proceeding, with which we agree. They are as follows:

> The proper way to apply the sections is this. On the request of either side, the court reads the former statement. If there is no serious discrepancy the court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable.
>
> Differences may be divided into four classes:
>
> (a) minor differences, not amounting to discrepancies;
>
> (b) apparent discrepancies;
>
> (c) serious discrepancies; and
>
> (d) material contradictions.
>
> Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English.
>
> If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the magistrate should say at once:
>
> 'The difference is not such as to affect his credit' and hand the statement back.
>
> If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.
>
> If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

[66] From the above, it is clear that there must be some material and real contradictions or circumstances unexplained by the witness before one can seek to impeach his credit.

[67] In the present case, in making his application before the trial judge, the appellant's counsel stated, '... we have a hunch here that the statements produced in court, and even if they are privileged, we have the right to have them produced for our inspection and thereafter. Proceed to impeachment of the witness'.

[68] In dealing with the application, the trial judge had asked the appellant's counsel repeatedly the nature of his application. However counsel failed to give any specific answer as to the exact nature of his application except to say that he had a hunch. The basis for his hunch was that the charge is punishable under s 377B ie consensual intercourse but PW1 comes to court alleging non-consensual intercourse which is punishable under s 377C.

[69] In this regard, the Federal Court in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10 had occasion to state:

> A 'hunch' is a presentiment, a mental impression or feeling, a vague expectation or foreboding, and we would like to make it abundantly clear that the 'hunch' referred to in Husdi (ante) certainly could not have been intended to operate without some secure basis or foundation in order to activate the provisions of ss 145 and 155(c) of the Evidence Act, and for this purpose sheer innate intuition of counsel will not suffice. A mere hunch per se for this purpose is *nihil ad rem*; it must be secured on a substratum of some basis or foundation. There must as a *sine qua non* be some material contradiction or other circumstances unexplained by the witness in the first instance before counsel can move to seek to impeach his credit ...

[70] In the present case, we find that counsel for the appellant had failed to comply with the correct procedure in applying for an impeachment proceeding against PW1's evidence. After being repeatedly asked by the trial judge, counsel for the appellant vaguely indicated, 'Pohon untuk semua statement yang direkodkan dari saksi ini (PW1) dalam penyiasatan kes ini, which include 112 statement'. Clearly, counsel was asking for all of PW1's statements recorded by the police during its investigation, including statements recorded under s 112 of the Criminal Procedure Code without specifying or identifying the relevant part of the statement.

[71] Based on the above, we hold that the trial judge had correctly exercised his discretion in dismissing the application of counsel to impeach PW1.

Corroboration

[72] We now turn to the issue of corroboration of PW1's evidence.

[73] The law on corroboration of the evidence of a victim in a sexual offence is settled in our jurisdiction. In this regard, the Court of Appeal had correctly

addressed the law by referring to various authorities both here and in other Commonwealth jurisdictions. As a matter of practice and prudence, not of law, corroboration is normally required in a sexual offence. Where corroboration is dispensed with, and the complainant's evidence is accepted as having established the case against an accused, the judge as a matter of law is required to warn himself of the danger of convicting on the uncorroborated evidence of the complainant. This requirement of the law is aptly put by Robert CJ in *Public Prosecutor v Emran bin Nasir* [1987] 1 MLJ 166 in the following words:

> I warn myself that, on a charge of rape, it is dangerous to convict on the evidence of the complainant alone, since experience has shown that female complainants have told false stories for various reasons. However, it is open to me, giving full weight to the warning that it is dangerous for me to convict without corroborative evidence, if I conclude that the complainant is, without doubt, speaking the truth.

The case also propounded that 'To amount to corroboration the evidence must confirm to some important respect to the girl's evidence that intercourse took place ... and that it was the defendant who committed the offence'. Although the case pertains to a female victim in a rape case it is equally applicable to a male victim in a sodomy case, such as in this appeal.

[74] It was submitted by the prosecution that the evidence of PW1, even without any corroboration is credible and probable, and on its own was sufficient to prove the charge against the appellant. His evidence, it was argued, is akin to that of a female rape victim who will not ordinarily 'stake her reputation by levelling a false charge concerning her chastity' (a phrase taken from *State of Maharashtra v Chandraprakash Kewal Chand Jain* AIR 1990 SCC (1) 550). Similarly, for PW1 to come out publicly to testify that he had been sodomised would obviously subject him and his family to ridicule. There was therefore no reason for him to level a false accusation against the appellant as the stigma will remain for his lifetime.

[75] This proposition is supported by a passage in *Chandraprakash Kewalchand Jain* where the Supreme Court of India stated:

> A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars ...
>
> What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.

[76] Similarly, our Evidence Act does not require any corroboration in sexual offences and a conviction for such offences may rest entirely on the credibility of the complainant. The need for corroboration remains a rule of good practice and prudence as stated by Thomson LP in *Din v Public Prosecutor* [1964] 1 MLJ 300, who opined:

> But the desirability for corroboration of the evidence of the prosecutrix in a rape case (which in any event has not yet crystallised into something approaching a rule of law and which is still a rule of practice and of prudence) springs not from the nature of the witness but from the nature of the offence. Never has it been suggested that the evidence of a woman as such invariably calls for corroboration. If a woman says her handbag has been snatched and if she is believed there can be no question of a conviction on such evidence being open to attack for want of corroboration. If, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated.

[77] Similarly, in *Public Prosecutor v Mardai* [1950] 1 MLJ 33, Spenser Wilkinson J had occasion to say:

> Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is *unusually convincing* or there is some corroboration of the complainant's story. It would be sufficient, in my view, if that corroboration consisted only of a subsequent complaint by the complainant herself provided that the statement implicated the accused and was made at the first reasonable opportunity after the commission of the offence. (Emphasis added.)

[78] The 'unusually convincing' test was explained in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 5 SLR 601 in the following words:

> ... testimony that, when weighed against the overall backdrop of the available facts and circumstances, contains that ring of truth which leaves the court satisfied that no reasonable doubt exists in favour of the accused.

[79] The Indian Supreme Court in *State of Kerala v Kurissum Moottil Antony* AIR 2007 SCW 1507 took a similar stand that corroboration is not a pre condition to secure a conviction in sexual offences. What is required is that a judge must be conscious, as a matter of prudence, that in some instances it is necessary to have corroboration. It opined:

> Corroboration is not the *sine qua non* for conviction in a rape case ...
>
> The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge ...

[80] That case also decided that the same principle applies to a case under s 377 of the Indian Penal Code the equipollent of our s 377A of the Penal Code. A

[81] A judge is entitled in law to convict even without corroboration if convinced of the truth of a complainant's evidence (*Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40 (PC)). If the evidence of a complainant in a sexual offence inspires confidence then it should be relied upon without the need of corroboration. It has been said that a refusal by the courts to convict based on the testimony of a victim of a sexual offence alone in the absence of corroboration, amounts to 'adding insult to injury' (*Bharwada Bhoginbhai Hirjibhai v State of Gujarat* AIR 1983 SC 753). B C

[82] Corroboration is independent evidence which implicates the accused by connecting or tending to connect him with the crime (*R v Baskerville* [1916] 2 KB 658). This may be in the form of independent witnesses or medical evidence (*Syed Abu Tahir a/l Mohamed Esmail v Public Prosecutor* [1988] 3 MLJ 485) or other scientific evidence such as DNA profiling. D

[83] In the present case, the trial judge had considered the following independent evidence and concluded that they were corroborative of PW1's testimony of having been sodomised by the appellant: E

(a) the evidence of the appellant's chief of staff, Ibrahim bin Yaacob (PW24) who testified that the appellant called him at about 12.15pm on 26 June 2008 and told him (PW24) that the appellant had left the envelope on the table and would like to have it delivered to him. PW24 then instructed PW1 to deliver the envelope to the appellant, which was duly complied with. This piece of evidence, according to the trial judge, corroborated PW1's evidence of his and the appellant's presence at Unit 11–5–1, thereby affording not only an opportunity for the appellant to commit the offence, but also confirming proximity of time; F G

(b) the CCTV recordings which is the primary evidence of the arrival and departure of PW1 and the appellant at the said condominium on that day, corroborating PW1's story that they met there; H

(c) the medical history of PW1 as narrated by Dr Siew Sheue Feng (PW3) and Dr Razuin bt Rahimi (PW23) both of whom had interviewed PW1 in their preparations of PW1's medical history. Both PW3 and PW23 confirmed in their evidence that PW1 had informed them that he had been sodomised, that lubricant was used, and that there was penetration and ejaculation; I

(d) the medical history of PW1 as reflected in the medical report (P22) jointly prepared by three doctors (PW2, PW3 and PW4) alleging that

he had been sodomised by a well-known public figure for the past two months with the last incident taking place on 26 June 2008;

(e) the evidence of PW2, PW3 and PW4 relating to the taking of swabs from PW1. The evidence of PW5 confirmed, from the analysis on four of the swabs taken from the perianal region, high rectal region and low rectal region of PW1, the presence of semen;

(f) the positive conclusion made by PW2, PW3 and PW4 that there was penile penetration of PW1's anus based on the medical history of PW1 and the sites from which the swabs were taken;

(g) the findings made by PW2, PW3 and PW4 that there was no scarring, fissure or any sign of recent injuries to the external areas of PW1's anus were consistent with PW1's evidence that lubricant was used; and

(h) the evidence of Dr Seah Lay Hong (PW5) and Nor Aidora bt Saedon (PW6) that the DNA profile of Male Y developed from the seminal extract from PW1's rectum matched the profile developed from the lock up items (toothbrush P58A, a Good Morning towel P59A and a mineral water bottle P61A) collected from the lock up occupied by the appellant.

[84] The trial judge found that there was ample corroboration of PW1's evidence that he had been sodomised by the appellant. He took into account those facts enumerated above and tested them against the probabilities of PW1's evidence and concluded that his story was adequately corroborated. He then made a finding that a prima facie case was established by the prosecution where he stated:

> [183] Based on all the above reasons, I found the prosecution, through the evidence of PW1 which had been corroborated in material particulars, had proved all the facts required to establish all the ingredients of the charge. I found a prima facie case as defined under s 180 of the Criminal Procedure Code had been made out against the accused. Therefore the accused was called to enter his defence.

[85] The Court of Appeal agreed with the findings of the trial judge. We have no reason to disagree with that finding.

[86] In this appeal, it was also submitted by counsel for the appellant that PW1 was an accomplice and as such his evidence requires corroboration. However, on the facts of this case, we find that PW1 is not an accomplice; we find him not a willing participant in the offence but in fact a victim. In any event, even if we were to agree with that submission of the counsel, we find there is ample corroborative evidence to support PW1's testimony.

No direct evidence to link the DNA profile of Male Y to the appellant

[87] Lengthy submissions were made on whether the prosecution had succeeded in proving that the DNA profile of 'Male Y' extracted from the three exhibits (P58A, P59A and P61A) obtained from the lock up was that of the appellant's. It will be recalled that the appellant was arrested and detained for police investigations on 16 July 2008. He was placed in a police lock up at IPK Kuala Lumpur from 11.30pm till his release at 8am the following day. The appellant brought with him a bottle of mineral water (P61A) when he went into the lock up. At 12.10am L/Kpl Nik Rosmady bin Ismail (PW18) handed to the appellant for his use, a plastic package containing a Good Morning towel (P59A), a toothbrush (P58A), a tube of toothpaste and a bar of soap. It was from the three exhibits (P58A, P59A and P61A) that the matching DNA profile of 'Male Y' was extracted and analysed by the chemist Nor Aidora bt Saedon (PW6).

[88] It is in evidence that the appellant was the sole occupant of the lock up on the night of 16 July 2008. According to PW18, one of the lock up sentries, the lock up was clear and empty prior to the appellant occupying it. The lock up was locked after the appellant left, and those items remained untouched and unmoved until the police forensic team seized them later for investigations.

[89] L/Kpl Mohd Jasni bin Jaafar ('PW20'), another sentry at the lock up said he heard the appellant brushing his teeth although he did not actually see this happening.

[90] It was submitted for the appellant that there was no direct evidence of anybody actually seeing the appellant using those exhibits recovered from the lock up.

[91] It is our finding that there was direct and strong circumstantial evidence pointing to the appellant using those exhibits. The lock up was solely occupied by the appellant, and there was no dispute on this. Those exhibits except for the mineral water bottle (P61A) were neatly packed in a plastic package when they were handed over to him. When the forensic team recovered them later, they were found scattered on the floor of the lock up, except for P61A which was placed on a half-wall in the lock up. The lock up remained locked until the arrival of the forensic team. Supt Amidon bin Anan (PW15), who headed the forensic team testified that he picked up those exhibits from the lock up, carefully placed them into separate envelopes, sealed and signed the envelopes before handing them over to PW25. The evidence of PW15 and the lock up sentries was not challenged by the appellant and was accepted by the trial judge.

[92] In the circumstances, the only inference that can be made is that the appellant had used those exhibits (*Liew Kaling & Ors v Public Prosecutor* [1960] 1 MLJ 306b).

Whether the exhs P58A, P59A and P61A are admissible as evidence

[93] The next submission was whether exhs P58A, P59A and P61A were illegally obtained by means of trickery and deception and as such should not be admitted as exhibits. Earlier, the appellant had declined for his blood sample to be taken for the purpose of DNA profiling. At the trial, the appellant then objected to the admission of those exhibits seized from the lock up which led to the trial judge holding a trial within a trial to decide on their admissibility. At the end of that mini-trial the trial judge made a ruling excluding those exhibits as well as the analysis made by PW6 on them, reasoning that 'they were obtained by unfair means against the wishes of the accused'. Immediately prior to the close of the prosecution's case an application was made by the prosecution to have that ruling reviewed in the light of later evidence of Supt Judy Balcious Pereira (PW25) and Supt Ahmad Taufek bin Abdullah ('PW26'). The trial judge upon that consideration reversed his earlier ruling giving the following reasons:

> Now, in light of the evidence adduced from the investigating officer and the arresting officer during the main trial, it is clear that the arrest of the accused was in fact lawful. His subsequent detention in the cell was indeed lawful and for a lawful purpose. Thus, the detention of the accused in the cell could no longer be said to have been for the sole purpose of obtaining DNA evidence from him by trick as alleged by the defence. In those circumstances, the court has no discretion but to allow those items collected from the cell and all evidence related to those items to be tendered as evidence. Therefore I now rule that those items and all evidence related to those items are admissible and could be tendered as evidence. My early ruling on this matter is accordingly reversed.

[94] Counsel for the appellant conceded that a trial judge may review his earlier ruling citing this passage in *R v Watson* [1980] 2 All ER 293:

> It is the duty of the judge to exclude from the jury's consideration evidence which is inadmissible. In the case of a written statement, made or signed by the accused, the judge must be satisfied that the prosecution have proved that the contested statement was voluntary, before allowing the jury to decide whether to act on it. Experience has shown that where the question of the voluntary character of a statement has been investigated and decided at a trial within a trial it is only in very rare and unusual cases that further evidence later emerges which may cause the judge to reconsider the question whether he is still satisfied that the statement was voluntary and admissible. But where there is such further evidence the judge has power to consider the relevance of the admissibility of evidence on which he has already ruled.

[95] Counsel thus submitted that only in rare and unusual cases may a judge review his earlier ruling, which is not the case here. It was further submitted that the evidence of PW25 and PW26 given in the main trial should not be considered as they were not called as witnesses during the trial within a trial.

[96] The prosecution on the other hand, submitted that after hearing the evidence of PW25 and PW26 the trial judge was satisfied that the detention of the appellant in the lock up was not for the sole purpose of obtaining DNA evidence from him using trickery or deception, and as such, the trial judge had full discretion to relook and review his earlier ruling.

[97] We are of the view that on the question of admissibility of an exhibit, a trial judge may review any previous ruling he made and if need be, reverse the earlier ruling. Support for this proposition can be found in *R v Watson* where the English Court of Appeal gave the same view as stated in this passage:

> In our view the judge was wrong to rule as he evidently did that he had no power to consider the relevance of evidence, given after the 'trial within a trial', on the issue whether the written statements were not voluntary and therefore inadmissible.

[98] Now, even if those exhibits recovered from the lock up were indeed illegally obtained, which we say were not, in law they remain admissible if found to be relevant to the case (s 5 of the Evidence Act). This passage from *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134 is illustrative of this proposition, which we now adopt with approval:

> [68] It is therefore clear that the court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. This rule applies, inter alia, to cases involving illegal searches, evidence obtained by secret listening devices or by undercover police operations. It also applies to evidence obtained by unfair procedures. Thus in *R v Apicella* [1986] 82 Cr App R 295, the English Court of Appeal upheld a rape conviction based upon the results of tests carried out on a specimen of body fluid obtained from the accused for medical reasons whilst he was on remand. In *AG for Quebec v Begin* [1955] SCR 593, it was held that even if a blood sample was obtained from the accused without his consent it is admissible to prove intoxication. It follows that the evidence relating to the blood sample taken from the accused is admissible as it is relevant even if it was taken without his consent.

[99] Lord Goddard CJ in the landmark case of *Kuruma Son of Kaniu v Reginam* [1955] 1 All ER 236, held that so long as the evidence is relevant, it is immaterial how and in what manner it was obtained. The learned CJ said this:

> In Their Lordships' opinion, *the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue.* If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it and, in Their Lordships' opinion, it is plainly right in principle. (Emphasis added.)

[100] Similarly the admissibility of evidence under our law is not based on the manner in which such evidence is obtained but as said earlier, on its relevancy.

[101] The Irish Court of Appeal in *Public Prosecution Service v Elliott and another* [2012] NI 154 made this observation which we also adopt:

> As Lord Steyn observed criminal justice involves a triangulation of interests which require consideration of interests beyond that of the defendant. At its heart lies fairness. The issue which arises in a case such as the instant case is whether evidence, which has been unlawfully obtained in that it arises from finger impressions taken with a device which had not been approved, is inadmissible as a matter of law (as opposed to being subject to exclusion in exercise of the trial judge's discretion conferred on him by art 76 of the 1989 Order). On that issue the law as laid down in *Kuruma* and successive cases is clear. It is not inadmissible by reason of the manner in which it was obtained.

[102] Based on the principle mentioned above, we are of the view that the conducting of a trial within a trial by the trial judge to determine whether the DNA samples from exhs P58A, P59A, P61A recovered from the lock up were obtained by unfair means or otherwise was a superfluous and an unnecessary exercise.

[103] It is our finding that the recovery of those exhibits used by the appellant while he was in the lock up was not a transgression of any rule, nor was it an infringement of the appellant's constitutional right to a fair trial. The appellant was lawfully detained at the lock up and the gathering of evidence there by the forensic team was a legal and fair method of police investigation. The trial judge was thus entirely right in admitting those exhibits and reversing his earlier ruling.

DNA evidence as corroboration

[104] We now deal specifically on how scientific evidence had proven that the DNA profile of Male Y can be linked to the appellant, thus corroborating PW1's allegation that he was sodomised by the appellant. In *Rusman Sulaiman v Public Prosecutor* [2013] 4 CLJ 305 this court said:

> It is now accepted by courts that bodily fluid, tissues, semen, saliva etc obtained from the crime scene may be established to connect an accused person to the crime ...

[105] In the present case, PW2, PW3 and PW4 took swabs from the rectal region of PW1, and, as confirmed by PW5's DNA analysis, sperm was found in PW1's rectum. PW5 stated that by logical deduction, if sperm was detected in

PW1's rectum, then there must have been penile penetration. This piece of evidence corroborates the allegation of PW1 that he was sodomised by the appellant.

[106] Whether the anus was torn or bruised is not, in our view, an issue which could refute the fact that PW1 had been sodomised. According to PW2, PW3 and PW4, the absence of such injury could have been due to the lapse of time prior to seeing the doctors, no undue force having been applied and the use of lubricant. This explanation in our view is plausible and we accept it.

DNA EVIDENCE

[107] What is critical in the present case is the DNA evidence adduced by the prosecution to corroborate PW1's evidence on the factum of penile penetration, an ingredient of the offence. In view of that, we will now embark on a detailed examination of the DNA evidence.

[108] The chemists (PW5 and PW6) carried out the polymerase chain reaction ('PCR') test in conducting the DNA examination and analysis. PCR is a biomedical technology in molecular biology developed in 1983 by Kary Mullis. PCR is used to amplify a single copy or a few copies of a piece of DNA across several orders of magnitude, generating thousands to millions of copies of a particular DNA sequence (*Handbook of Molecular and Cellular Methods in Biology and Medicine* (3rd Ed): edited by Leland J Cseke, Ara Kirakosyan, Peter B Kaufman, Margaret V Westfall, Taylor and Francis Group, US; 2011).

[109] By this method, when any cell divides, enzymes called polymerase make a copy of the entire DNA in each chromosome. The first step in this process is to 'unzip' the two DNA chains of the double helix. As the two strands separate, DNA polymerase makes a copy using each strand as a template. This is stated in the evidence of PW5 which reads:

PW5

S: Earlier in your testimony, you mentioned about the technique that you have adopted in analysing the specimens given to you for DNA analysis, You mentioned about the Polymerase Chain Reaction technique. Can you explain what Polymerase Chain Reaction technique is?

J: Polymerase Chain Reaction is a technique which is used to amplify DNA meaning making millions of copies of DNA from an original template and this reaction is carried out with the aid of enzyme called detect polymerase and other reagents in an instrument known as the thermalcycler. The objective of PCR is to amplify DNA and at specific target of the DNA geno. This specific targets are the STR loci which

A are stated in my report. So, the end result of PCR is product which are million fold copied of DNA at this specific targets.

[110] This technique is now widely used around the world in DNA investigation. The advantage of this technique is that it increases the sensitivity B of detecting the DNA because of the amplification. PW5 further explained the advantage of using the PCR technique in carrying out the DNA analysis. In the examination-in-chief, she stated:

S: What was the technique adopted before the PCR technique was C adopted?

J: Before the PCR technique, the Forensic DNA community was using a technique known as RFLP, Restriction Fragment Length Polymorphism. That was before the invention of the thermalcycler and invention of the PCR techniques.

D

S: Can you explain what are the advantages in using the PCR technique compared to the Restriction Fragment Length Polymorphism technique?

J: The PCR technique increase the sensitivity of detecting DNA because E of the amplification. In addition, it is able to analyse the graded (sic) DNA, smaller fragments of DNA or rather DNA of a poor quality compared to the previous techniques RFLP which uses or which requires high quality DNA for a successful analysis.

F CHALLENGES ON DNA

[111] Against that background, we now consider the issues raised by counsel for the appellant challenging the reliability of the DNA analysis.

G *Degradation of sample*

[112] It is the appellant's contention that as the samples were taken some 56 hours after the alleged incident, and it took another 40 hours before the samples reached the chemist (PW5), it is therefore impossible for the samples H to be in pristine condition. It was further submitted that the surprisingly fresh condition of the samples, was inconsistent with their history thereby pointing to the possibility of the samples being compromised on their way to PW5. This is premised on the opinion of DW4 from his reading of the analysis by PW5.

I **[113]** However, it was never the prosecution's case that the samples were in pristine condition. This is clear from the evidence of PW5. She conceded under cross-examination that the samples had undergone some degradation but maintained that what is important is to see whether the DNA is readable despite the degradation. If the DNA is readable, findings can be made. The

appellant also criticised the manner PW25 kept the samples ie instead of keeping in chillers or refrigerator he had kept them in a drawer in his air conditioned room. This the appellant said could lead to further degradation of the samples.

[114] One crucial point to note is that from the evidence of PW5 and PW6, if the DNA is completely degraded it means that no DNA profile could be obtained or developed. But it does not mean that when a DNA profile was obtained, no degradation had taken place. They emphasised that there might be some slight degradation, but the damage is not substantial enough to destroy the DNA entirely.

[115] In *State v Jyotish Prasad & Anor* LIND 2009 DEL 799 (the High Court of Delhi), the issue of DNA degradation was considered. It observed:

> While, as a hypothesis, it may be stated that a vaginal swab kept in an unrefrigerated condition would be subject to degradation, but that has to be established as a fact. In the present case, the DNA analysis report does not indicate that the vaginal swab Exhibit PW-14 obtained from the deceased had deteriorated to such a condition or, at all, which did not permit them to do DNA profiling in respect thereof. In any event, the question of degradation is only limited to the vaginal swab and not to the microslides (Exhibits 15b, 15c and 15d). In his cross-examination, PW-6 (Dr AK Srivastava) has categorically stated that microslides, being slides which are properly dried, have no chance of degradation. The DNA profiles of the biological fluids present in the microslides were found identical with the profiles from the blood samples of the appellants Jyotish Prasad and Ashish Kumar. Thus, the arguments with regard to degradation advanced by the learned counsel for the appellant Ashish cannot be accepted.

[116] On a related issue, PW5 under cross-examination explained that the decline on one of the peaks was an indication that there could be degradation of the samples. But she further affirmed that despite the possibilities of contamination and degradation, it did not affect her reading of the samples obtained from swabs taken from the high rectal and the low rectal. She testified that the DNA profile obtained from swabs B7, B8 and B9 was clear and unambiguous. It was obviously readable. The degradation has no effect on the DNA profile obtained from those samples.

[117] PW6 also explained that degradation will always occur in any biological samples. But when DNA analysis is conducted and good perfect profiles are obtained, it means that even if degradation had occurred, it is not sufficient to affect the quality of the DNA.

[118] Similarly, PW5 in re-examination stated:

S: Even if degradation occurred in the sample, taken from the inner part of the body, the high rectal and the low rectal of Saiful, can you confirm whether this has affected the reading of the genotyping in your analysis?

J: No, it has not affected. That fact that the DNA profile was clear, it is readable, the degradation has no effect on the DNA profile that is obtained from these samples.

S: You can confirm that you can still obtain the allele reading from the 16 Loci of these samples?

J: Yes. Degradation becomes a problem only when the DNA profile breaks down and is not readable.

[119] In *Rudy bin Jupri v Public Prosecutor* [2013] 3 MLJ 362, the samples were only handed over by the investigating officer more than a month since the post-mortem. Despite that time span, the chemist in that case was still able to develop the DNA profile from the samples.

[120] The scientific position in regards to degradation of DNA was also considered in *R v Wayner Butler* [2001] QCA 385 where the Court of Appeal, Supreme Court of Queensland held that the issue of degradation is irrelevant as DNA profile can be extracted as long as it is air dried. The dictum of the court at p 6 para 27 reads:

> Thirdly, one of the advantages of the process by which DNA is extracted, so Dr Budowle said, is that unlike earlier processes such as the ABO process referred to later, partial degradation does not prevent good results from being obtained. That is because, unlike the other processes, it focuses on very small portions of the DNA, a few hundred letters long at the most. These may be mere fragments of DNA.

[121] In our case, PW6 when asked whether she took into consideration the occurrence of contamination on all the exhibits she received, PW6 testified that there was no contamination, as all the profiles were readable. All the quality assurances were in place. The reagent blank stayed blank. If any of the peaks was contaminated by eg the 18 allele or contaminated by the people in her laboratory (or for that matter by PW25 as suggested by the defence), then the other short tandem repeat ('STR') locus will also be contaminated, which was not the case here. Even her negative control in her elecytropherogram was blank as well. If there was contamination, then one would be able to see the 18 allele in all the loci D3S1358 across all the samples that she had analysed.

[122] Premised on the above we agree with the prosecution that it is incorrect and misleading to conclude that because of the degradation the DNA profiling is rendered unreliable. It is thus our finding that the degradation has no effect whatsoever on the DNA profiling in this case.

Break in the chain of custody of the exhibits

[123] The appellant's counsel submitted that the samples had been compromised as there was a break in the chain of custody of the exhibits. It was also his submission that the DNA evidence had been planted. Let us now consider the evidence before us.

[124] The evidence shows that PW25, after receiving the sample bag (P27) had cut it open to add his own markings to the samples inside. He was merely adhering to departmental guidelines the Inspector General Standing Orders ('IGSO') which required him as an investigating officer to put proper markings and labelling to exhibits for the purpose of identification in courts. Having seen the physical evidence, especially the bottom part of P27 that was snipped by PW25, we observed that he was extremely careful in handling it. PW25 even left the snipped portion of P27 attached to it to show transparency in his action. PW25 then sent the samples to PW5 who thereafter developed the Male Y DNA profile.

[125] PW5 in her testimony confirmed that she did not detect any tampering of the seals of the exhibits marked B to B10. We therefore find that there was no break in the chain of custody of those exhibits. As such, we agree with the Court of Appeal that the integrity of the samples was not compromised.

[126] In view of our finding that there was no break in the chain of custody of evidence, the fanciful suggestion of the appellant's counsel that the DNA evidence had been planted is therefore unsustainable.

Presence of allele 18

[127] The next issue is the presence of allele 18. It was contended that the presence of allele 18 proves the existence of a third party contributor on B9 (low rectal swab) and P59A ('Good Morning' towel).

[128] According to PW5 the existence of DNA in six loci is the minimum threshold requirement before one can imply or conclude the presence of a third party contributor. Therefore, the presence of one 'foreign' allele (of which PW5 considered it not reportable) cannot be taken to mean there exists a third party contributor. This explains why on B5 (perianal region) one other contributor was reported as the 18 allele was found on six loci. This is one of the reasons why the unaccounted alleles pointed out by the appellant was not reported by PW5 and PW6 in the summary of their STR results, as they did not meet the minimum threshold.

[129] The existence of allele 18 found on B9 (low rectal swab) and the P59A

('Good Morning' towel), however, does not affect the finding by PW6 that the DNA found on the P58A, P59A and P61A matched the DNA found by PW5 on swabs B5 (perianal region), B7 (high rectal) and B8 (high rectal). The DNA profile matched each other indicating that the DNA identified originated from the same source ie Male Y. From the evidence, it is established that Male Y is the appellant.

Reading and interpretation of data

[130] According to the chemists (PW5 and PW6) DNA profile is unique in that no two individuals would have the same DNA. Even siblings and twins have different DNA unless they are identical twins. In the case of twins, the profiles are different because there would be two separate ovum fertilised by two separate spermatozoa.

[131] Since specific locations are used for DNA profiling (short tandem repeats profiling) which has a high degree of discrimination, the profile can safely be used to discriminate between two individuals. Because of the uniqueness of DNA profile of each individual, it is used to identify people or individuals. In forensic context, it is used to compare the origin of certain biological evidence.

[132] PW5 received the samples collected by the doctors from PW1 through the investigating officer (PW25). Out of the twelve samples collected, PW5 conducted tests and examinations on eleven of them. They are swabs B to B10 (P6A–P6K). On swabs B to B10 she carried out both confirmatory and non-confirmatory tests to detect and confirm the presence of semen. The tests she carried out were:

(a) acid phosphate test — non-confirmatory;

(b) 'PSA' (phosphate specific antigen) test — confirmatory; and

(c) sperm isolation test — confirmatory.

[133] From these tests, PW5 was able to detect semen and using the sperm isolation test she found sperm cells in those samples. From the microscopic examination, she found sperm heads. This finding of sperm heads, after more than two days is not unusual as according to PW5, even though sperm cells are prone to microbial attack, but because of the membrane structure of the sperm heads, they are better preserved.

[134] It was submitted by the prosecution that this finding is concordant with the article written by GM Willot and JE Allard entitled *Spermatozoa — Their presence after sexual intercourse*. In the summary of this article, the writers state:

... the longest time after intercourse that spermatozoa have been found on a total of 2410 casework swabs are as follows:

internal vaginal swabs 120 hours

external vaginal swabs 120 hours

rectal swabs 65 hours

anal swabs 46 hours

oral swabs 6 hours.

[135] PW5's discovery of the sperm heads is not only consistent with the above literature but also consistent with the evidence of PW1 of being sodomised on 26 June 2008 between 3.01–4.30pm. His rectum was swabbed on 28 June 2008 between 10.30–11pm approximately 56 hours after the act. The discovery of the sperm heads is thus consistent with current scientific knowledge.

[136] PW5 further explained that the seminal stains were subjected to an extraction process known as the differential extraction process to separate the sperm cells. By this process, the sperm cells would appear in sperm extract and non-sperm cells in non-sperm extract.

[137] Apart from the differential extraction process and the microscopic test, PW5 also conducted DNA test, which according to her was the ultimate test, in determining the sperm cells. The DNA profiles obtained in the present case were very clean and clear and she was thus able to interpret them without any difficulty.

[138] With regard to the mixed profile in this case, she subtracted the known contributor in order to deduce who the other contributor was. In this case she could easily do it since she had the known sample of PW1.

[139] PW5 and PW6 had carried out the PCR technique in conducting the DNA examination and analysis. Using this technique, the DNA extract is examined at 15 STR loci and one sex determining locus called amelogenin. It is significant as it increases the discrimination power and sensitivity to differentiate between individuals.

[140] As stated earlier, the PCR technique increases the sensitivity of detecting the DNA because of the amplification which can be done from a minute amount of DNA. In addition, it is able to analyse the smaller fragment of DNA or DNA of poor quality.

[141] PW5 also testified that PCR technique involved the re-amplification of DNA as not all the PCR will be successful at the first instance. If there are problems seen after amplification, then re-amplification is carried out to rectify those problems. This usually will result in the most successful DNA profile.

[142] Both chemists testified that their reports P25 and P26 were made based on their interpretation of the DNA profile from the PCR technique that they had adopted.

[143] Both chemists interpreted their data based on the entire 16 loci. According to PW5, interpretation could not be made by discriminating and isolating the locus and it must be based on the entire 16 loci. The mathematical approach relied by the defence in raising the possibilities of having some other contributors by referring to one or two loci was not the correct approach to interpretation.

[144] PW5 further testified that even if the erroneous mathematical approach were used, the possibility of other contributors from the unaccounted alleles at some of the STR loci (and not reported in the appendix in P25), does not disprove the existence and presence of Male Y, whose profile was obtained from the interpretation of the entire 16 STR loci. PW5 also testified that apart from interpreting the entire 16 STR loci, she also interpreted the DNA profiles from all the samples.

[145] When asked about the possibility of the combination of certain alleles which by mathematical permutation could result in ten contributors, PW5 explained that the mathematical permutation is not the approach to interpretation. If this approach is adopted some of these combinations become impossible when further loci are examined. This is just a mathematical exercise and not interpretation.

[146] During cross-examination, the defence did not dispute that the forensic community had recommended that the minimum number to make an association is six loci despite the appellant having his experts with him throughout the cross-examination. This piece of evidence given and explained by PW5 was not challenged. The defence merely put to PW5 the possibility of other unaccounted alleles at one or two loci. PW5 explained that that was not how the interpretation of data/profile should be done.

[147] PW5 was also asked about allele drop-out, a phenomenon where the expected allele is not observed. She explained the situation in which it could occur and said that there is no other exercise in determining drop-out except by reference samples (term used by the chemist).

[148] On the omission to follow recommendations 7 and 8 of the 'Recommendations on the Treatment of Dropout' found in the publication of the International Society of the Forensic Genetic, of which she is a member, PW5 said that these are merely recommendations and not standards. They cannot be applied rigidly to each and every case. She said that all interpretations of the mixture are based on their validation studies and experience.

[149] With regard to 'T-value' (threshold value), which she did not adopt when drop-out was considered to have occurred, she said it was of no significance in this case. To adopt a standard T-value would mean adopting a mathematical approach and not interpretation. She explained that the Chemistry Department adopted the threshold of 50 RFU that is equated to T-value. PW 5 also dealt at length on the implication of drop-out.

[150] Both chemists also touched on the issue of stutter. From their evidence, it could be gleaned that the Chemistry Department has its own guidelines for the identification of stutter and the range of stutter established through validation studies is 10%–20% of the real peak or parent allele. The threshold for considering a peak as stutter is 50 RFU and a stutter would not be reported in the STR summary.

[151] On statistical evaluation, PW5 testified that the calculation of the matching probability of DNA samples will be conducted only when there is a sample or a known contributor.

[152] In our case the sample is B10 (the bloodstained sample) taken from PW1. PW5 explained during cross-examination that she only did the statistical evaluation on samples A3 (P12A and P12B) with the known sample B10 to make association of the crime stain profile and the known contributor (PW1).

[153] PW5 further testified in re-examination that she will make a statistical evaluation to make a match that this profile comes from the same origin of the known sample.

[154] PW5 concluded that from the DNA examination using the PCR technique, the result was that DNA profiles derived from the seminal stain spots P12A and P12B of trousers P12, distinguished one common male contributor having a DNA profile matching the profile of bloodstained sample B10. The probability of a coincidental match from a randomly selected unrelated individual, as calculated based on the population database of Malaysian Malays is 1 in 570 quadrillion (570 x 1015).

[155] PW5 further explained how the calculation was made. According to her, the result was calculated from a population database of samples of

Malaysian Malays and the frequency of each allele is then computed. Using the law of genetics with the correction of subpopulation and subculture the figure of 1 in 570 quadrillion was obtained.

[156] She further testified that this was a very high figure, indicative of the high certainty that these two DNA profiles originated from the same individual. PW5 in cross-examination affirmed that the purpose of the statistical report is to give weight to the evidence. The statistical evaluation was done by using a software called the DNA view developed by Dr Charles Berner. From this software, the calculation of match probabilities was made.

[157] PW5 also testified that as part of the quality assurance, the statistical data kept by the Chemistry Department is regularly audited.

[158] PW6 also explained as to the population database kept by the Chemistry Department. The DNA profile of population database kept by the Chemistry Department consists of the DNA profile of the major ethnic groups in Peninsular Malaysia namely Malay, Chinese and Indian based on the STR 16 loci. This population database is kept in the DNA view software.

[159] PW6 also testified on the match probability that she had conducted on the DNA profile of Male Y in her report as well as Male Y in PW5's report. According to PW6, the match probability of a randomly selected unrelated individual to have a matching profile at the STR loci is approximately 1 in 470 quintillion (470 x 1018) as calculated based on the Malaysian population database of the Malay race, 1 in 52 quintillion (52 x 1018) as calculated based on the Malaysian population database of the Chinese race and 1 in 210 quintillion (210 x 1018) as calculated based on the Malaysian population database of the Indian race.

[160] PW6 testified further that the document she referred to in court was the DNA view statistical calculation. It consisted of the DNA profile that she had obtained namely the locus, the alleles, the frequencies and the probabilities. This document referred to by PW6 is the same document as reflected in the DNA view software. PW6 had compared the DNA profile obtained from the swabs of P58A, P59A and P61A with the report of PW5. She concluded that the common DNA profile that she obtained from those swabs matched the DNA profile of Male Y, indicating that the DNA identified originated from the same source.

[161] In *R v Doheny and Adams* [1997] 1 Cr App Rep 369, the English Court of Appeal stated that the DNA expert must explain in detail his findings such as:

(a) the matching DNA characteristic (how the results tabulated in the report was obtained); and

(b) the random occurrence ratio (accuracy of the test including how the calculation is made).

[162] *Doheny and Adams* also stated that the evidence of the random occurrence ratio depends greatly on the other available evidence. The requirements as stated in *Doheny and Adams* was primarily concerned to provide guidance of a general nature in relation to the presentation of DNA evidence in order to determine its conclusiveness by obviating any probability that the DNA belongs to someone else.

[163] In our case, the PCR technique was employed using the 16 STR loci which gives a higher discriminatory profile.

[164] It would appear that after *Doheny and Adams* the significance of DNA test will depend greatly upon what else is known about the suspect and how these pieces of evidence are sufficient to connect the suspect with the crime. This approach was adopted with approval by the Court of Appeal in *Hanafi bin Mat Hassan*.

[165] In our case, PW6 carried out the match probability of Male Y profile based on PW5's STR summary. It is indeed a very high probability based on the DNA of the Malaysian population database that Male Y belongs to the same person. Considering the other evidence, there is no dispute that the samples which PW6 had examined came from the items that were used solely by the appellant.

[166] It is thus indisputable that the profile of Male Y developed and analysed by both the chemists belongs to none other than the appellant.

[167] As propounded by *Doheny and Adams*, DNA evidence standing alone may not be sufficient to connect an accused person to his guilt but it remains as a strong corroborative strand, which if coupled with other evidence will create a fine rope sufficient to convict him.

[168] Hence, the DNA evidence of Male Y in the present case is the key corroborative evidence to the element of penile penetration by the appellant.

[169] It was the contention of the appellant that the statistical data must be produced before the court, failing which, no weight could be attached to such findings.

[170] In reply, the prosecution submitted that both chemists, PW5 and PW6, had explained at great length of the matching probability by using the DNA view software. This is in line with the requirements in *Doheny and Adams*.

[171] Premised on the above, we agree with the prosecution that it is not the statistical data that has to be produced but for the experts to explain in detail how the results tabulated in their reports were obtained and how the calculation was made, as demonstrated by PW5 and PW6.

[172] When considering whether we should accept PW5 and PW6's evidence, we must first conclude that their evidence would fall under that of an expert's opinion, and we have no doubt they are experts. As regards the opinion of an expert, it was observed in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 as follows:

> ... the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step,

(*Public Prosecutor v Lam San* [1991] 3 MLJ 426; [1991] 1 CLJ (rep) 391 and *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151).

[173] Having considered the totality of the evidence, and having taken into consideration the above discussion we have no doubt that the appellant failed to discredit PW5 and PW6. There was nothing inherently incredible about PW5 and PW6's evidence.

Finding of a prima facie case

[174] Based on the above, we agree with the Court of Appeal that the trial judge had sufficiently evaluated the evidence before him in arriving at his finding that a prima facie case had been made out against the appellant, at the close of the prosecution's case.

The defence

[175] The appellant's initial defence was one of alibi. A notice under s 402A of the Criminal Procedure Code was earlier filed and served on the prosecution on 19 June 2009, stating that the appellant was not at the place and time where the alleged offence had taken place. In the notice of alibi, the appellant listed 13 witnesses in support of his alibi. However, when the defence was called, the appellant chose not to call any of his alibi witnesses. The alibi defence was thus abandoned.

[176] The prosecution submitted that the failure by the appellant to provide the explanation for the abandonment of his alibi defence warranted an adverse inference under s 114(g) of the Evidence Act to be invoked. In support, we were invited to adopt the position taken by the then Supreme Court in *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423; [1991] 3 CLJ 2387; *Ramakrishnan s/o Ramayan v Public Prosecutor* [1998] 3 SLR 645; the Court of Appeal's case of *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855; and the Indian High Court case of *Satyavir Singh v State of Uttar Pradesh* AIR 1958 Cri LJ 1266.

[177] We are of the view that the principle stated in the above cases is an exception to the general principle. In *Goh Ah Yew v Public Prosecutor* [1949] 1 MLJ 150, it was held that:

> No such inference, however, can be drawn against an accused person in a criminal trial. There is no duty upon an accused person to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other.

The Supreme Court in *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421 approved the above proposition.

[178] We hold that the above proposition is still good law, and therefore decline the invitation by the prosecution to invoke an adverse inference against the appellant for the abandonment of the alibi defence.

[179] The appellant in this case elected to make an unsworn statement from the dock. In his statement, the appellant denied ever sodomising PW1. The appellant contended that the incident had never happened, and that PW1 had lied. The appellant stated that PW1 had all the opportunity to flee from the room where the incident happened as it was not locked or latched. PW1 further did not seek immediate medical attention after the incident.

[180] The appellant further stated that PW1 did not lodge a police report immediately after the incident. Further, his subsequent conduct of having a drink, a friendly conversation with the appellant immediately after the alleged incident, his attendance at a PKR's function, and a meeting with Anwar Ibrahim's club the next day, were not consistent of him having been sodomised by the appellant. He also stated that PW1 could not have given in to him as PW1 is younger and physically bigger than him, whilst he is old and weak with a history of back injury and had undergone a major back surgery.

[181] The appellant also criticised the evidence of the chemists, PW5 and PW6, as well as the investigating officer (PW25) in that the DNA obtained by PW5 did not come from the samples taken from PW1's rectum. He further

stated that the samples collected from the perianal and rectum of PW1 had degraded and had been tampered with. He further claimed that his DNA had been planted.

[182] The appellant also claimed that he was deprived of a fair trial in that the prosecution had failed to disclose evidence material to his defence coupled with the failure of the court to direct the prosecutor to do so. He criticised the court for failing to take contempt proceedings against the media and persons who made prejudicial statements outside the court to influence the course of the trial, and to act on the allegation that PW1 had an affair with a member of the prosecution's team. He further criticised the finding of the court that PW1 was a truthful witness, and accused the court of prejudging his case. He was also unhappy with adverse comments made by Abdul Malik Ishak JCA when delivering an earlier judgment of the Court of Appeal, which according to him had prejudiced and deprived him of a fair trial.

[183] His other complaints included his unlawful arrest, the illegally obtained DNA evidence, the integrity of the samples, the possibility of the samples having been tampered with, the lack of credibility and competency of the prosecution's expert witnesses and the trial judge's refusal to recuse himself. He also complained that the court had created a situation under which he could not have possibly given evidence under oath. In short, the appellant alleged that all the above infirmities revealed that the trial judge had failed to ensure a fair trial.

[184] Finally, the appellant alleged that the entire process against him is nothing but a conspiracy by the Prime Minister Dato' Sri Mohd Najib bin Tun Abdul Razak to send him into political oblivion by attempting once again to put him behind bars. The existence of a political conspiracy by the Prime Minister and others was raised extensively by the appellant in his statement from the dock.

[185] In support of his defence, the appellant called seven witnesses, namely Dr Than Aung @ Muhamad Osman bin Abdul Hamid (DW1), Dr David Lawrence Wells (DW2), Yusni bin Ali ('DW3'), Dr Brian Leslie McDonald (DW4), Lim Kong Boon ('DW5'), Mohd Najwan bin Halim ('DW6') and Dr Thomas Hoogland (DW7).

[186] DW1 was a doctor from PUSRAWI, who first examined PW1. DW1 was offered to the defence by the prosecution at the close of the prosecution's case. According to DW1, on 28 June 2008 PW1 had turned up at PUSRAWI for treatment complaining of pain in the anus when passing motion. DW1 then examined PW1 using a proctoscope for suspected piles. Immediately after the examination PW1 told DW1 that he was sodomised by a VIP and was

scared to go to the police. According to DW1, had he been informed of that earlier, he would not have carried out the examination of PW1 as this would be a matter for forensic medical examination. DW1 in his evidence also testified that PW1 told him that he had been assaulted by the introduction of a plastic object into his anus.

[187] DW2 is a professor at the Victorians Institute of Forensic Medicine Melbourne, Australia. He was called as an expert witness by the appellant to contradict and rebut the prosecution's expert witnesses. In his evidence DW2 testified that beyond 36 hours after a sexual assault one could hardly succeed in collecting any sample of value from which DNA could be extracted. DW2 also testified that in view of the manner the samples were packed, sealed and stored, it was not possible to extract DNA from the sperm cells because samples of this nature would have degraded. Therefore, he concluded that it was impossible to have positive findings on the samples taken from PW1 more than 56 hours after the alleged incident. In his evidence DW2 even suggested that the samples could be contaminated, and that the appellant's DNA was planted. DW2 also criticised the medical report on PW1 (P22) for lacking in particulars, such as the omission to state the time when the samples were collected, and the errors of dates on certain exhibits.

[188] DW3 is the administrative officer of PUSRAWI. He was called to identify IDD16; a file kept at PUSRAWI on PW1. According to DW3, he only had a copy of the report, and did not know what happened to the original.

[189] DW4 is the second expert witness called by the defence. He is a consultant at Molecular Genetics, Linkfield New South Wales, Sydney, Australia. DW4 similarly testified that it was unlikely that any trace of semen could be retrieved 36 hours after a sexual assault. Commenting further on the retrieval of the samples which took place 56 hours after the alleged offence was committed, DW4 shared the same opinion as DW2 in that it would be very unlikely any sperm cell could be retrieved from PW1's rectum. According to him active bacterial action in the rectum for 54–58 hours would have degraded the samples.

[190] DW4 was also of the opinion that the action of the investigating officer (PW25) in not following the instruction given by PW3 as to the proper safekeeping of the samples had further contributed to the degradation of the samples. According to him as the samples were not stored in a freezer as instructed by PW3, any trace of DNA on the samples would be destroyed. DW4 also commented on the accreditation of the laboratory of the Chemistry Department, and added that the two chemists, Dr Seah Lay Hong (PW5) and

Nor Aidora bt Saedon (PW6), were not competent to extract DNA and interpret the DNA profiles. DW4 also attacked the differential extraction process carried out by PW5.

[191] DW5 is the director of the Forensic Division at the Chemistry Department. He was called by the defence to testify on the accreditation of the Forensic Division of the Chemistry Department for various disciplines of forensic science which include control substances, toxicology, trace evidence, biology, firearms and tool marks, and question document. During cross-examination by the prosecution DW5 testified that the Chemistry Department had been accredited under the American Society Crime Lab Directors ('ASCLB/LAB') Organisation.

[192] DW6 who was 26 years old, was an officer employed at the office of 'Penasihat Ekonomi Selangor'. In his evidence, he claimed to know PW1 when they were studying together at University Tenaga Nasional in Bangi. He testified of his acquaintance with PW1. He claimed that he had lunches, attended the same orientation at the university and stayed at the same hostel with PW1. DW6 gave evidence as to PW1's activities as a student, the associations he joined and the various positions he held at the university. DW6 testified that through the social media 'Friendster', PW1 had uploaded pictures of himself with some senior Ministers. DW6 also testified of the other photos which were uploaded by PW1 in the social network showing his campaigning activities for Barisan Nasional (BN) during the 2008 General Election. DW6 testified that PW1 hated the appellant. This was evident from the photograph of the appellant uploaded by PW1 in the social media, under a caption 'Pemimpin Munafik' (hypocrite leader). DW6 also testified that he was surprised when he discovered at the end of February 2008 that PW1 worked for the appellant. According to DW6, this went against PW1's stand when he was a student.

[193] DW7 was the last witness called by the defence. DW7 is the orthopaedic surgeon from Munich Germany. He informed the court that he examined the appellant on 5 September 2004. He found the appellant suffering from slip disc at levels L4 and L5 on the left and lateral stenosis with facet joint arthritis. He carried out an operation on the appellant on 6 September 2004, and the appellant was hospitalised from 6–27 September 2004. After the appellant was discharged and about 4 1/2 months later, DW7 examined the appellant again. He found a significant improvement of the appellant's condition in comparison to the condition before the operation. DW7 did not see the appellant for the next six years until 8 September 2011, which was about a month before he testified at the trial. From his examination and the history of the appellant's illness, DW7 claimed that the appellant could

not possibly perform the act as described by PW1 as the appellant was labouring under intense back pain resulting from degeneration in the facet joint.

[194] At the end of the defence's case the trial judge acquitted and discharged the appellant of the charge. He was of the view that the result of the analysis done by PW5 could not be reconciled with the expert evidence of DW2 and DW4. The trial judge was of the view that the evidence of DW2 and DW4 had cast a reasonable doubt on the guilt of the appellant.

[195] The Court of Appeal disagreed with the decision of the trial judge. In allowing the appeal, the Court of Appeal was of the view that the trial judge had failed to carry out a critical examination of the evidence when preferring DW2 and DW4's evidence over that of PW5 and PW6. The Court of Appeal also held that the evidence of DW2 and DW4 had not raised a reasonable doubt on the prosecution's case.

Political conspiracy

[196] One of the complaints raised by the appellant in this appeal was the failure of both the High Court and the Court of Appeal to consider or evaluate the appellant's defence of a political conspiracy.

[197] It was submitted that the political conspiracy defence was not 'plucked from the air', but supported with the names, dates and events. These were admitted by PW1 in the course of his evidence. They were:

(a) that on 24 June 2008 he had met with the then Deputy Prime Minister ('DPM') Dato' Sri Mohd Najib bin Tun Abdul Razak at his residence. He had earlier met the DPM's special officer Hj Khairil Anas at his house and then drove to meet the DPM;

(b) on the same evening of 24 June 2008, he met Senior Assistant Commissioner (SAC1) Datuk Mohd Rodwan bin Mohd Yusof, a high ranking police officer at Hotel Melia at Jalan Imbi;

(c) on 25 June 2008, he contacted the Inspector General of Police, Musa Hassan;

(d) on 27 June 2008, he met his uncle Tuah bin Mohd Ali and Rahimi bin Osman and Senator Mohd Ezam Mohd Noor; and

(e) on 27 June 2008, he met Datuk Mumtaz Begum bt Abdul Jaafar.

[198] From the above, it was argued that prior and subsequent to the alleged incident of sodomy but before lodging the police report, PW1 had met with

prominent persons, including the adversaries of the appellant. This was not dealt with by the High Court and the Court of Appeal. Thus, it was submitted that there existed a political conspiracy which rendered it improbable that the alleged incident ever happened. Instead, it was more probable that the alleged incident was concocted by PW1 and the persons he met between 24–27 June 2008.

[199] It was also submitted that the existence of a political conspiracy involving the then DPM and others was raised extensively by the appellant in his statement. However, the Court of Appeal dismissed the appellant's statement and instead made adverse comments on it. This had occasioned a miscarriage of justice.

[200] It is a well established principle of criminal law that the burden of proof lies on the prosecution to prove its case beyond reasonable doubt. There is no similar burden placed on the accused to prove his innocence. The accused is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution's case. (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311).

[201] The complaint by the appellant was that both the High Court and the Court of Appeal did not consider the political conspiracy defence which if accepted or believed would entitle the appellant to an acquittal.

[202] We accept that the courts below did not explicitly consider the political conspiracy defence which was raised by the appellant in his unsworn statement from the dock. In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge (*Lee Boon Gan (f) v Regina* [1954] 1 MLJ 103; *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39; *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104; and *Juraimi bin Husin v Public Prosecutor Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383).

[203] The issue is did the trial judge and the Court of Appeal adopt the correct principle in assessing the appellant's statement? The trial judge in assessing the appellant's statement observed as follows:

> [196] The accused in this case had denied sodomising the complainant. Although this denial was made from the dock, it was still a denial. He believed the charges against him was made not because the sodomy took place, but to send him into political oblivion by attempting to put him behind bars.

[204] The Court of Appeal after discussing the law on a statement from the dock, agreed with the trial judge that the appellant's statement from the dock was a mere denial. The Court of Appeal observed as follows:

> [108] For the respondent to succeed in his defence, it is incumbent upon him to adduce evidence which can answer the allegations in the charge. In this case, the respondent did not even deny that he was at the scene of the crime at the material time and date as stated in the charge. He never disputed that his car was seen entering and leaving the condominium at the material time. He also did not dispute that he was seen entering the lift to the fifth floor of the condominium and later leaving the place. He also did not dispute that he had directed his chief of staff, PW24 to arrange for an envelope to be handed over to him at the said condominium and that PW24 had instructed PW1 to bring the envelope to him. The respondent also did not dispute the fact that PW1 had brought the envelope to him at the place of the incident. The learned judge found that the respondent's statement from the dock is a mere denial with which we fully agree. The bare denial by the respondent does not amount to any doubt whatsoever. A credible defence is one that answers the evidence thrown at it by the prosecution. It is also imperative that the respondent explain his case.

[205] We hold that the Court of Appeal had adopted the right principle in assessing the appellant's statement from the dock. As such we find no merit on the appellant's complaint that the Court of Appeal had seriously misdirected itself in making adverse comments on the appellant's decision to give his statement from the dock. While it is true that it is within the appellant's right to give a statement from the dock, that statement must however amount to a credible defence. A mere denial does not amount to a credible defence. We hold that the defence of political conspiracy remains a mere allegation unsubstantiated by any credible evidence.

[206] We will now consider the evidence of other defence witnesses.

[207] As stated earlier, the trial judge had found that the defence through the evidence of DW2 and DW4 had cast a reasonable doubt as to the guilt of the appellant. The reasons given by the trial judge were as follows:

> [203] Clearly, the evidence from the prosecution witness on the result of analysis done by PW5 on the samples collected from the complainant could not be reconciled with that of the expert opinion given by the defence through DW2 and DW4. Which expert was right? This brings to the forefront the issue of integrity of the samples. How the samples were handled after they were taken from the complainant and before they reached PW5 for analysis became very important.
>
> [204] It was the prosecution evidence that all samples collected from the complainant were put individually in plastic receptacles labelled and sealed with Kuala Lumpur Hospital seal by Dr Siew (PW3). These receptacles were then put in tamper proof Hospital Kuala Lumpur plastic bag (P27) and heat sealed. This plastic bag (P27) was then handed over to the investigating officer PW25 to be handed to

PW5 for analysis. It was not in dispute that PW25, at his office, cut open P27. According to him it was done for the purpose of individually re-labelling the receptacles. In my view this was not necessary since the receptacles were already packed and labelled by the experts who collected them. The whole purpose of packing and labelling and sealing by the experts who collected the specimen was to maintain the integrity of the samples and the chain of custody.

[205] It was the prosecution stance that the tampering with P27 did not in any way compromised the integrity of the samples in the receptacles since the receptacles were individually sealed with Hospital Kuala Lumpur seal. DW3 when examined on this subject said that the receptacles were not tamperproof (meaning the seal could be removed and resealed) from the manner in which they were sealed and the type of material used as seals. By cutting open P27, the confidence in the integrity of the samples was gone.

[206] After going through the defence's evidence particularly those stated above, this court could not, at this stage, with 100% certainty, exclude the possibility the integrity of the samples taken from the complainant had been compromised before they reached PW5 for analysis. As such it was not safe to rely on the DNA result obtained by PW5 from the analysis conducted on those samples. That being the case, there was no evidence to corroborate the evidence of PW1 on factum of penetration.

[207] This court was left only with the evidence of PW1 to prove penetration. This being a sexual offence, it is trite law that the court is always reluctant to convict an accused person based solely on the uncorroborated evidence of the complainant. Therefore the accused is acquitted and discharged from the charge.

[208] The Court of Appeal disagreed. It was of the view that the trial judge had erred in his finding that the evidence of DW2 and DW4 had created a reasonable doubt on the prosecution's case. After a critical examination of the reasons given by the trial judge, the Court of Appeal held:

[150] In our view, the comments and the criticisms by the two expert witnesses of the defence pertaining to the evidence of PW5 and PW6 on their analysis and the three doctors who prepared the report in exh P22 has no probative value as to cast a reasonable doubt on the prosecution's case. The learned trial judge had erred in concluding that the evidence of these two expert witnesses had shown the possibility of the samples taken from the complainant to have been compromised and the results of the DNA analysis by PW5 to be unsafe to be relied upon, thus the absence of any corroborative evidence on the factum of penetration.

[209] The question now is whether the Court of Appeal came to the right conclusion. Based on what we discussed earlier, we agree with the conclusion of the Court of Appeal that the trial judge had indeed erred in accepting the evidence of DW2 and DW4 that the samples taken from PW1 had been compromised and unsafe to be relied upon resulting in an absence of corroborative evidence on the factum of penetration.

[210] Further, we are of the view that the trial judge was in error in imposing the '100% certainty' standard of proof on the prosecution to refute the possibility of the samples taken from PW1 being compromised. The trial judge had imposed too high a burden on the prosecution. The correct standard of proof to constitute proof beyond reasonable doubt need not reach certainty but carry a high degree of probability.

[211] On the facts of this case, we find that the possibility of the integrity of the samples taken from PW1 having been compromised before reaching PW5 is remote. Such a suggestion can be dismissed with this one sentence, 'of course it is possible, but not in the least probable' (*Miller v Minister of Pensions* [1947] 2 All ER 372). Denning J in that case, described the standard of proof required in criminal cases with these words:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

That principle has long been accepted by our courts and the law on this issue is well settled (*Saminathan & Ors v Public Prosecutor* [1955] 1 MLJ 121; *Public Prosecutor v Datuk Haji Harun bin Haji Idirs & Ors* [1977] 1 MLJ 180).

[212] With regard to the credibility of DW2 and DW4, the Court of Appeal stated as follows:

> [155] ... The learned trial judge turned an indulgent eye upon the evidence of DW2 and DW4 when he should have treated them with caution. There was a total failure of any observation with regard to credibility ....
>
> [156] Of no less serious error on the part of the learned trial judge, was the failure to reason out the basis for his acceptance and preference for these two defence experts which is an integral part of the analysis and evaluation of evidence by a presiding judge.
>
> [157] ...
>
> [158] ... In our view, the reception by the learned trial judge of the defence expert witnesses' evidence is not objective and is one sided ....

[213] Having considered the evidence of DW2 and DW4, we agree with the findings of the Court of Appeal in rejecting their evidence for the following reasons:

(a) both DW2 and DW4 had not done any tests on the samples but merely interpreted and made observations of the findings of PW5 and PW6. Whereas, PW5 and PW6 had personally carried out the DNA analysis on the samples; and

(b) as regards his proficiency, DW4 had his last proficiency test in 2004, seven years prior to the trial. On the other hand, PW5 and PW6 had undergone proficiency tests once every six months.

[214] For the above reasons, we hold that the evidence of DW2 and DW4 has not raised any reasonable doubt on the prosecution's case.

[215] We now touch on the evidence of DW1. It will be recalled that DW1 is the doctor from PUSRAWI who first examined PW1. It was the appellant's contention that DW1 should have been called by the prosecution as a witness in order to unfold the narrative of its case. This is especially so when DW1 in his evidence said that PW1 had told him that he had been assaulted by the insertion of a plastic object into his anus.

[216] It was submitted that had DW1 been called as a prosecution witness, there would have been two versions in the prosecution's case. One version would be that PW1 was sodomised by the appellant and the other, that PW1 had been assaulted by the insertion of a plastic object into his anus. This by itself would have created a doubt in the prosecution's case. Therefore, an adverse inference ought to have been drawn against the prosecution under s 114(g) of the Evidence Act.

[217] Let us now consider the evidence of DW1 which may be summarised as follows:

(a) PW1 came to see him complaining of pain in his anus when passing motion;

(b) after the examination, PW1 told him that he had been sodomised by a VIP;

(c) DW1 alleged that PW1 told him that he had been assaulted by the insertion of a plastic object in his anus;

(d) in his initial medical report, he made no mention of the assault on PW1 by the insertion of a plastic object. He admitted adding to his medical report that PW1 had told him of the assault;

(e) he advised PW1 to go the government hospital for forensic examination since PUSRAWI is a private hospital and as such could not undertake such an examination; and

(f) with regard to the insertion of a plastic object in PW1's anus, he

admitted that he never asked PW1 on the nature of the plastic object that was inserted or made other inquiries regarding the insertion. Neither did he ask PW1 whether it was an act of self insertion or by someone else.

[218] PW1 in his evidence denied ever telling DW1 that he had been assaulted with the insertion of a plastic object into his anus. The doctors at Hospital Kuala Lumpur who on the same day examined PW1 never said that PW1 told any of them that he had been assaulted by the insertion of a plastic object. Neither was this stated in PW1's police report. Based on that we hold that DW1 is not telling the truth. Further had that allegation been true, DW1 would not have advised PW1 to go for forensic examination at a government hospital.

[219] In the circumstances, we agree with the prosecution that DW1 is an unreliable and untruthful person. That explains why the prosecution had chosen not to call him as its witness. It is trite that the discretion to call any witness lies with the prosecution and the court will not interfere with the exercise of that discretion (*Adel Muhammed El Dabbah v A-G for Palestine* [1944] AC 156; *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222). The non-calling of DW1 by the prosecution, in our view, does not create any gap in its case as it had been fully narrated through the evidence of PW1, and corroborated by the three doctors (PW2, PW3 and PW4) and the chemists (PW5 and PW6). As such the question of drawing an adverse inference against the prosecution under s 114(g) of the Evidence Act does not arise.

[220] DW6 was called to discredit PW1. However, no evidence was adduced to support his testimony. For that reason, we find that his evidence has no evidential value and does nothing to discredit PW1.

[221] It was also the contention of the defence that the appellant was labouring under intense back pain and he could not have performed the alleged act of sodomy as described by PW1. DW7 was called to support his claim. We say that this defence is an afterthought. The appellant never put to PW1 that he could not have possibly performed the act because of his back pain.

[222] Further, it is in evidence that DW7 did not examine the appellant in 2008. He only examined the appellant on 8 September 2011, a month before he testified at the trial. As opposed to this, Dr Jeyaindran a/l C Sinnadurai ('PRW4') a rebuttal witness, called by the prosecution examined the appellant just three weeks after the incident. According to PRW4, the appellant informed him that he (the appellant) had coitus with his wife one week after the incident. PRW4 also said that the appellant did not complain that he (the appellant) was

having back pain and from his observation during that medical examination. The appellant's movement was not restricted by any back pain whatsoever.

[223] Premised on the above, we are of the view that DW7's opinion that the appellant was unable to perform the act was wholly without basis.

[224] In the result, we hold that there is overwhelming evidence to support PW1's allegation that he had been sodomised by the appellant. The scientific evidence (medical and DNA evidence) adduced by the prosecution clearly established that sperm cells belonging to the appellant were found in the lower and upper rectum of PW1. The only logical explanation for this is that PW1 must have been sodomised by the appellant. The unsworn statement of the appellant, which evidentially carries little weight, and the evidence adduced through his witnesses, failed to cast any reasonable doubt on the prosecution's case. We are thus convinced beyond reasonable doubt that PW1 had been sodomised by the appellant as charged.

CONCLUSION

[225] For the above reasons, we agree with the Court of Appeal that the appellant has not created any reasonable doubt on the prosecution's case. The prosecution therefore has established its case beyond reasonable doubt.

[226] The appeal against the conviction is dismissed. Accordingly, we affirm the decision of the Court of Appeal in convicting the appellant.

SENTENCE

[227] The appellant and the prosecution filed an appeal and a cross-appeal respectively against the sentence imposed by the Court of Appeal.

[228] Counsel for the appellant submitted that the Court could use its discretion to give the appellant a lighter sentence under the law, saying that the appellant is not an ordinary person as his contributions when he was with the government was numerous and far reaching. He further submitted that even while in the Opposition, he had made significant contributions in advancing democratic principles and awakening the consciousness of the public. He submitted that these are considerations which must be taken into account by this court. There is no good reason to enhance the jail term.

[229] Counsel further submitted that the only previous conviction imposed on the appellant was under s 2(1) of the Emergency (Essential Powers) Ordinance No 22/1970 ie for corrupt practice. He asked this court to disregard that as it is now spent. He further referred to s 377B of the Penal Code which

provides that a person guilty of an offence under s 377A shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to whipping. However, this does not exclude the court's discretion under other punishment provisions of the Criminal Procedure Code such as under s 294, *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68 was cited.

[230] He submitted that when imposing the term of five years, the Court of Appeal had refused an adjournment to enable the appellant to produce medical evidence. He contended that this is a factor that this court is entitled to take into account in considering whether the Court of Appeal had judicially considered the quantum of sentence, and acting upon it before imposing the sentence on the appellant.

[231] In reply, the prosecution argued that the five year sentence imposed by the Court of Appeal was wrong in principle as it is manifestly inadequate. It was submitted that a five year sentence will be a serious error having regard to his previous conviction.

[232] It was further submitted that the conviction under s 2(1) of the Emergency (Essential Powers) Ordinance No 22/1970 is not a spent conviction. There is thus a previous conviction standing against the appellant which ought to be considered.

[233] The prosecution further submitted that there are several reasons why this offence is serious. These are:

(a) the appellant's personality, status and position in society;

(b) previous criminal record of the appellant;

(c) the age of the victim and his relationship with the appellant;

(d) the manner and how the offence was committed;

(e) the physical and psychological trauma suffered by the victim; and

(f) absence of repentance and lack of remorse.

[234] The prosecution agreed that the appellant had contributed to the nation while he was in the government as well as in the opposition. However, the offence committed by the appellant is a serious one. It was submitted that the higher the man is, the more serious the crime he commits. The prosecution referred us to *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240.

[235] The principle to be followed in dealing with an appeal against sentence is clearly stated by Hashim Yeop A Sani in *Public Prosecutor v Loo Choon Fatt*

[1976] 2 MLJ 256 in these words:

> The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

[236] As sentence is a matter of discretion, the appellate court should be slow in interfering with the sentence imposed by the courts below. Raja Azlan Shah Ag LP (as His Royal Highness then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, at p 84 opined:

> ... that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[237] Taking into consideration the seriousness of the offence and the fact that the appellant had taken advantage of his position as the employer of a young victim, the sentence of five years is not grossly excessive. We are of the view that if at all the Court of Appeal erred, it is more on the side of leniency.

[238] With regard to the cross-appeal, we are of the view that the sentence could not be said to be manifestly inadequate that warrants our intervention.

[239] We therefore dismiss both the appeal and the cross-appeal. The sentence imposed by the Court of Appeal is hereby affirmed.

Appeal and cross-appeal dismissed and decision of the Court of Appeal on conviction and sentence affirmed.

Reported by Ashok Kumar